(17,225.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 640.

THE CITY OF NEW ORLEANS, PETITIONER,

vs.

JOHN G. WARNER.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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1 *Agreement as to Record.*

United States Circuit Court of Appeals for the Fifth Circuit.

JOHN G. WARNER
vs.
CITY OF NEW ORLEANS.

It is hereby stipulated and agreed that in making up the transcript of appeal to the United States Supreme Court herein the clerk shall include in the same the record hereof, No. 691, and the record of the prior transcript to this court, No. 364, the whole to compose the transcript herein.

June 11, 1898.

R. DE GRAY,
WM. GRANT,
J. D. ROUSE,
Solicitors for John G. Warner, Appellee.
S. L. GILMORE,
BRANCH K. MILLER,
Solicitors for Appellant.

(Endorsed:) Filed June 11, 1898. J. M. McKee, clerk.

JOHN G. WARNER, Appellant,
v.
CITY OF NEW ORLEANS, Appellee. } No. 364.

Be it remembered that heretofore, to wit, on the 30th day of March, 1895, a transcript of the record of the above-entitled cause from the circuit court of the United States for the eastern district of Louisiana was filed in the office of the clerk of the United States circuit court of appeals for the fifth circuit, and is in the words and figures following, to wit:

Circuit Court of the United States, Eastern District of Louisiana.

JOHN G. WARNER
vs.
CITY OF NEW ORLEANS. } No. 12350. In Equity.

Bill in Equity.

Filed Nov. 26, 1894.

To the judges of the circuit court of the United States for the fifth circuit and eastern district of Louisiana:

John G. Warner, a resident of the city of Brooklyn and a citizen of the State of New York, brings this his bill on his own behalf as

well as on behalf of all other parties holding obligations of the
2 same nature and kind as your orator, who may intervene for their interest herein and may contribute to the costs, expenses and counsel fees incurred in this suit, whose names are numerous and are unknown to your orator, against the City of New Orleans, a municipal corporation of the State of Louisiana and a citizen of said State.

And thereupon your orator complains and says, that by act No. 165 of March 18th, 1858, the legislature of said State provided for the leveeing, draining, and reclaiming swamp lands in certain portions of the parishes of Orleans and Jefferson, the boundaries whereof are fully set forth in said act—which is made part hereof—and said lands were divided into three draining districts, which were respectively designated, as the first, second, and third draining districts, to which, pursuant to a subsequent act of said legislature, a fourth draining district was added—which will be noticed hereafter—that for the purpose of carrying out the provisions of said act, it was provided by the second section thereof, for the appointment of board of draining commissioners for each of said districts, who were by the fourth section of said act invested with all the rights and powers necessary to drain said several draining districts, and to that end were allowed at all times to enter the lands within said districts, to place engines and machinery thereon to dig drains, to make necessary embankments, and levees, and generally to do all things necessary to be done in draining and reclaiming the lands within said districts, and said boards of commissioners by the fifth section of said act were authorized to sue and be sued.

2. And your orator further shows that by the 7th section of said act said boards of commissioners were each empowered to levee, drain and reclaim in their respective districts as follows: whenever either of said boards of commissioners were ready and prepared to drain their respective sections or districts, such board was directed to cause a plan thereof to be made, accurately designating the limits of the section or district to be drained as far as possible, the subdivisions of the property therein contained and the names of the proprietors, also the dimensions and directions of the canals to be dug, and the place where the steam-engines would be placed, which plan or plans were to be deposited in the office of the recorder of mortgages of the parish in which the section or district to be drained was situated, and notices were directed to be inserted in French and English, in two newspapers, once a week for four successive weeks, announcing that said boards of commissioners would proceed to drain such sections, and describing the place where the plan was deposited, accurately defining the limits thereof, and indicating as nearly as possible the time when the draining thereof would be completed, and the possible cost of the work; and said section further provided, that after the publication aforesaid, that said boards of commissioners should apply by petition to one of the courts in said parish of Orleans for the portion of the section or district lying within the limits of said parish, and to the district court in the parish of Jefferson for that portion of the section or district lying within the limits

of said parish, which court or courts were directed upon due proof having been made of the publications and notices aforesaid, to
3 decree, that each portion of the property situated within said limits was subject to a first mortgage, lien, and privilege in favor of such boards of commissioners for such an amount as might be assessed upon such section or district, and interest thereon, at six per cent. per annum from demand thereof, which decree of the district court of the parish of Orleans was directed to be recorded in the office of the recorder of mortgages for said parish, and the decree of the district court for the parish of Jefferson was directed to be recorded in the office of the recorder of said parish, which lien, privilege, and first mortgage, it was further declared by said section should take precedence over all mortgages, liens, privileges, whatsoever, whether tacit, conventional, legal or judicial, and should attach to the property until the amount assessed and the interest thereon should be fully paid.

3. And your orator further shows that by the eighth section of said act said boards of commissioners were, each within their respective districts or sections, given the right and authority and power to levee such uniform assessment or assessments upon the superficial or square foot of lands situate within the draining section or district of such board to defray the expense of the construction of the levees, machinery, canals and other works necessary for the purpose of carrying out the provisions of said act, as applicable to its particular district, which assessment was to be collected from time to time, as the wants of such boards might require; and by the ninth section of said act it was provided that for non-payment of said assessments, judgments should be recoverable therefor before any court of competent jurisdiction and the lands assessed should be sold according to law.

4. And your orator further shows that an act supplementary to the above act, No. 165, approved March 18, 1858, was duly passed by the legislature of Louisiana, and approved March 17, 1859, being No. 191 of that year, by which it was enacted in the first section thereof, that *that* to enable said boards of commissioners to carry into effect the provisions of said act No. 165, approved March 18, 1858, and to commence the works therein contemplated, that each of said boards of commissioners should have power and authority to issue bonds in the sum — $500, having not more than thirty years to run and bearing interest, not exceeding 8 per cent. per annum, to be designated "draining bonds," which were not for any one district to exceed $350,000; and by the second section of said supplementary act, it was provided that it should be the duty of said boards of commissioners, upon issuing the bonds aforesaid, to fix and determine the amount of assessment to be levied upon the superficial or square foot of land situate within the draining district or section of each board or boards, in accordance with the provisions of the aforementioned original act, approved March 18, 1858, and fix and apportion the amount to be paid yearly, by the owners of said lands in order to pay the annual interest on said bonds as might mature, and the manner of redeeming such bonds was pro-

vided for in other sections of said act, as will appear from a reference thereto which is made a part hereof.

4 5. And your orator further shows that the legislature of the State of Louisiana, by act approved March 1, 1861, being No. 57 of that year, and entitled "An act to provide for the collection of the assessments for drainage, under the acts of March eighteenth, eighteen hundred and fifty-eight, and the supplementary act thereto of March seventeenth, eighteen hundred and fifty-nine," enacted that the amounts of assessments, which the boards of the several draining districts were authorized to affix and apportion, to be paid yearly by the owner or owners of the land within said districts, in order to pay interest on the bonds issued, or to be issued by said boards of commissioners, and such bonds as might mature by virtue of the second section of said supplementary act No. 191, approved March 17, 1859, should be collected and sued for as follows, to wit: as soon as any assessments had been made notice thereof should be given, a copy thereof should be filed in the third district court of New Orleans for all the assessments on the property within the limits of the parish of Orleans, and in the third judicial district court sitting at Carrollton, for assessments made on property within the limits of the parish of Jefferson, and on which tableau of assessments thus to be filed the property assessed should be set forth with the amounts assessed, and the names of the owners thereof, if known, and if the owners' names were unknown, then it should be so stated in said assessment-roll that the property assessed belonged to owners unknown; that a petition should be filed with said assessment-roll praying for an order that all persons whom it might concern do show cause within thirty days from the first publication of said order, if any they had, why said assessment-roll should not be approved and homologated; that said order thus rendered should be published in the French and English languages at least twice a week for thirty days, in one newspaper published in New Orleans, as to the order of the third district court of New Orleans, and in one newspaper published in the parish of Jefferson, as to the order of the third judicial district court sitting at Carrollton, and that after said publications the said courts should, on motion of counsel of said boards of commissioners, approve and homologate said assessment-rolls, which should be a judgment against the property assessed and the owners thereof, on which execution might issue as on judgments rendered in the ordinary mode of proceedings, and that the court should at the same time and in the same judgment order the delinquent parties to pay 10 per cent. in addition to the amount assessed, to pay costs and counsel fees.

6. And your orator further shows that afterwards, to wit: in the year 1871, the legislature of the State of Louisiana, by act No. 30 of that year, authorized and empowered the Mississippi & Mexican Gulf Ship Canal Company, a corporation then existing and domiciled in the city of New Orleans, to excavate drainage canals, and build protection levees within the limits of New Orleans and Carrollton, on certain terms and conditions expressed in said act, and by the second section thereof said company was authorized and em-

powered to dig a canal and with the earth removed from the same to build outside of said canal a protection levee, in the rear of the city and near the shore of Lake Pontchartrain, the exact location of said canal and levee, and of all canals to be dug and levees to be built by said company to be designated and fixed by the board of administrators of said city of New Orleans, and by the fourth section of said act, said Mississippi & Mexican Gulf Ship Canal Company was authorized to build a canal and protection levee below the city of New Orleans to connect the lower end of the protection levee along the lake with the Mississippi river, of a sufficient size to fully protect the city from overflow, and on a line to be designated by said board of administrators of said city, and to construct a like canal and protection levee above the city, the dimensions and locality in like manner to be designated by said board of administrators, the object of these two canals and protection levees being the protection from overflow, of the area between the Mississippi river, Lake Pontchartrain, and said lower and upper protection levees; and by the fifth section of said act said canal company was authorized to dig all the smaller canals required for the drainage of New Orleans and the lands in the rear of the city, of the dimensions of ten feet or more in width; and by the sixth section of said act, it was the duty of said board of administrators of the city of New Orleans, immediately after the passage of said act, not only to locate the lines of the canals and protection levees specified in the various sections of said act, but they were also required to build and run all pumps and drainage machines necessary to lift the drainage water from the said canals over into Lake Pontchartrain and keep the water in said canals in process of excavation as far as practicable at a proper level for the work of excavation, and at the same time assist the draining of the adjacent lands; and by the eighth section of said act it was made the duty of the city surveyor of New Orleans, or an engineer appointed by said board of administrators for the purpose, to examine the work done by the said Mississippi & Mexican Gulf Ship Canal Company during each month, and upon measurement of the width and depth of the canals, or parts of canals, dug and protection levees built to certify as to the cubic yards excavated and the number of cubic yards of protection levees built during said month, and that it should be the duty of the administrator of accounts on the presentation to him of said certificates of the city surveyor, or engineer appointed as aforesaid, to draw a warrant or warrants on the administrator of finance in payment of the work so done, at the rate of fifty cents per cubic yard for excavation, and fifty cents per cubic yard for the protection levees built, the said warrants to be of such denominations as might be required by the president of said company, and these warrants it was the duty of the administrator of finance to pay on presentation to him in case there was any fund in the treasury to the credit of the said Mississippi & Mexican Gulf Ship Canal Company, but should there not be sufficient funds to cash said warrants, then said administrator of finance was by said act re-

quired to endorse upon the same the date of presentation,
6 after which date the said warrant or warrants bore interest at the rate of 8 per cent. per annum until paid; and by the ninth section of said act it was enacted that in order to provide funds for the payment of work to be done by the said company, that the three boards of commissioners for the draining districts of New Orleans and Jefferson established under acts of March 18th, 1858, March 17th, 1859, and the several acts amendatory thereof, and any and all other person or persons or corporations who might have been in possession, should transfer to the board of administrators of New Orleans, all money, assessments, and claims for drainage in their hands or under their control, all titles to real estate, all books, plans, tableaux and judgments in favor of commissioners, the office furniture of said drainage commissioners, a true statement of the claims of drainage commissioners against the city of New Orleans to be adjudicated and settled out of the money collected by the city of New Orleans and pertaining to said drainage districts, and that the board of administrators of New Orleans should be and were *were* thereby subrogated to all the rights, powers and facilities possessed and enjoyed by the commissioners of said several drainage districts or any other corporation charged with the duty of draining and leveeing within the limits of the city of New Orleans and Carrollton and the said board of administrators were directed to collect from the holders of property within said drainage districts the balance due on the assessments as shown by the books of the first, second, and third drainage districts under acts of March 18, 1858, that of March 17th, 1859, and the several supplementary and amendatory acts thereto, and which assessments were thereby confirmed and made exigible, and further, to make assessments of two mills per superficial foot in those parts of the drainage districts as existing and created by said acts of March 18, 1858, and March 17th, 1859, and amendments thereto, and on such other lands as should be brought within the protection levees contemplated by said act 30 of 1871, where no assessments had been made, and to execute and enforce the same as provided by the several acts of the legislature creating and regulating said boards of drainage commissioners, and that all money received by said boards of administrators from the said commissioners of drainage, the collection of claims for drainage then due, from the collection of assessments, and from any of the sources of revenue contemplated by the provisions of the aforesaid section nine, should be placed to the credit of said Mississippi & Mexican Gulf Ship Canal Company, to be held as a fund to be applicable to the drainage of New Orleans and Carrollton (which was a virtual consolidation of all of said districts and said additional territory brought within said protection levees), in accordance with the provisions of said act, and that all property not money, so received, should be held in trust for the payment of said Mississippi & Mexican Gulf Ship Canal Company, and ultimately for the benefit of New Orleans, should the same not be required for the work of drainage, provided, that all the rights and powers and facilities possessed

and enjoyed by said boards of administrators of New Orleans
7 relative to drainage should be so construed as not to conflict with the rights, facilities acquired by said company in excavating canals and building levees, as stipulated in the various sections of said act; and the twelfth section provided that said act should be favorably construed so far as to favor all the purposes and objects of said act, and the operations and provisions thereof, all of which will more fully appear by reference to said act No. 30 of the year 1871, which is made a part hereof.

7. And your orator further shows that on the 7th of February, 1872, under and pursuant to said act 30 of 1871, said board of administrators of the city of New Orleans adopted an ordinance creating the fourth drainage district, which embraced those other lands not embraced within the first, second and third draining districts, but were brought within the protection levees contemplated by said act where no assessments had been made or levied, as will more fully appear by reference to a copy of said ordinance herewith filed and made part hereof and marked "ordinance No. 1359."

8. And your orator further shows that said boards of drainage commissioners were duly appointed, qualified and entered upon the duties imposed upon them by the various acts of the legislature hereinbefore referred to, for the first and second drainage districts, and pursuant to said acts, respectively prepared, filed and deposited in the office of the recorders of mortgages of the parishes wherein the land to be drained was situated, their plans, designating the lands therein to be drained, the subdivisions of the property therein contained, the names of the proprietors, the dimensions and directions of the canals and the places where the engines were to be located; and after due publications of the notices as required by said acts that said commissioners would proceed to drain said lands, naming the place of deposit of said plans and defining the limits of the lands to be drained, and including as nearly as possible the time required for the completion and the probable cost of the drainage; and on the petition of said commissioners, decrees were rendered by the district courts designated by said acts, that such portion of said property within the limits of the section or district to be drained, and exhibited by the plans was subject to a first lien, privilege, and mortgage, in favor of said commissioners for such amounts as might be assessed upon said property for its part of the costs of drainage, with interest thereon with six per cent. per annum from demand, and subsequent like liens, privileges and mortgages were decreed at the suit of the board of administrators of New Orleans in said third and fourth drainage districts, said decrees, the courts rendering the same, the dates of rendition and the title of the proceeding are as follows, to wit:

The judgment "In the matter of the commisssioner of the first draining district, praying a decree of mortgage privilege, etc.," rendered by the third district court of New Orleans in suit No. 16269 on the docket of that court on the 24th day of August, 1861; the judgment "In the matter of the commissioners of the second drain-

ing district praying for a decree of mortgage privilege, etc.," rendered by the third judicial district court of Jefferson in suit
8 No. 1938, on the docket of that court rendered and signed on the 29th of April, 1861; the judgment "In the matter of the board of commissioners of the second draining district praying, etc.," rendered by the third district court of New Orleans, in suit No. 15846, on the docket of said court rendered and signed on the 9th day of February, 1861; the judgment "In the matter of the city of New Orleans praying for a decree of mortgage privilege, etc.," upon property in the third draining district (said city acting under said act 30 of 1871), duly rendered by the eighth district court, parish of Orleans, being No. 7482 on the docket of that court, on the 4th day of May, 1872; and the judgment "In the matter of the board of administrators praying for a recognition of mortgage and recovery of assessments in the fourth draining district,"—said board of administrators herein also acting under said act 30 of the year 1871—rendered by the superior district court, parish of Orleans, in suit No. 807 on the docket of said court, on the 29th day of January, 1873, and signed on the 3d day of February, 1873, copies of judgments are herewith filed and marked Exhibits "A," "B," "C," "D," and "E," and which were respectively recorded in the mortgage office where the land to be affected thereby was situated, as follows, to wit: 1st drainage district, in the mortgage office for the parish of Orleans, April 17, 1872; and April 6, 1882; second draining district, parish of Jefferson, April 29, 1861, and December 12, 1871; second draining district, parish of Orleans, April 11, 1861, and December, 1871; third draining district in the mortgage office for the parish of Orleans, May 11, 1872, and April 6, 1892; and in the fourth draining district, in the mortgage office for the parish of Orleans, February 8, 1873.

9. And your orator further shows that under the authority conferred by the aforesaid acts of the legislature the board of commissioners of the first draining district on the 12th day of September, 1861, levied an assessment of $3\frac{3}{10}$ mills per superficial foot on the lands within said district, to pay the cost of drainage directed by said acts; that on the 11th of March, 1861, the board of commissioners of the second drainage district levied an assessment of two mills per superficial foot on the lands of said district to pay the cost of drainage of said lands under the same authority; that on the 11th of June, 1872, the board of administrators of the city of New Orleans, then vested with power to make assessments by virtue of said act 30 of 1871, levied an assessment of two mills per superficial foot on all lands within said third district to pay the cost of draining said lands; and on or about the 20th of November, 1872, the said board of administrators, in the exercise of the authority conferred by said act 30 of 1871, levied an assessment of two mills per superficial foot on lands within the aforesaid fourth draining district, to pay the cost of draining said lands, all of which will more fully appear by reference to the resolutions of said boards of commissioners and ordinances of the common council of said city of New Orleans, copies of which are herewith filed and made part

hereof, and marked respectively "assessment 1," "assessment 2," "assessment 3" and "assessment 4."

9 10. And your orator further shows that the tableaux required by the provisions of said act No. 57 of the year 1861, exhibiting the amounts assessed for such drainage, the names of the owner of the lands as known, and where unknown stating the owners were unknown, were duly filed in the courts hereinbefore mentioned in accordance — the provisions of said act, and on motion and after due publication of said orders that all persons concerned show cause why said assessment-rolls should not be approved and homologated, said tableaux or rolls of assessment were duly homologated and approved by judgments of said courts, which by the terms of said act No. 57 of 1861 were and are judgments against the aforesaid lands as well as the owners thereof, for the amounts assessed and 10 per cent. costs and counsel fees and said judgments, the titles of the proceedings, the courts rendering the same, and the dates of rendition are as follows: "In the matter of the commissioners of the first draining district," etc., No. 17828, third district court, parish of Orleans, homologating the assessment-rolls for said district, for the first instalment of 10 per cent. thereof, rendered March 11, 1863, and No. 25935, superior district court for the parish of Orleans, for the remaining nine instalments, from the second to the tenth, both inclusive, was rendered March 21, 1874.

"In the matter of the commissioners of the second draining district, praying," etc., No. 1938, the judgment homologating the assessment-roll of said district, above Toledano street, New Orleans, was rendered by the third judicial district court for the parish of Jefferson on the 15th and signed on the 23d March, 1869.

"In the matter of the commissioners of the second draining district, praying," etc., No. 15846, the judgment homologating the assessment-rolls of said district below Toledano street, New Orleans, was rendered by the third district court for the parish of Orleans on the 11th and signed on the 16th November, 1868.

"In the matter of the city of New Orleans, praying for the homologation of assessment-roll," etc., for the third draining district, the judgment homologating said assessment-rolls was rendered on the 8th and signed on the 13th day of November, 1872, by the eighth district court of the parish of Orleans.

"In the matter of the board of administrators, praying for a recognition of mortgage and recovery of assessments in the fourth draining district," No. 807, the judgment of homologation of the assessment-rolls for said district was rendered on the 15th and signed on the 18th of March, 1873, by the superior district court of the parish of Orleans, all of which judgments are specially referred to for greater certainty, and copies of the same are made part hereof and are marked respectively, "homologation 1," "homologation 2," "homologation 3," "homologation 4" and "homologation 5;" all of said courts so rendering said judgments, outside of said third district court, having become possessed of jurisdiction over said matters under authority conferred on them by the legislature of the State passed subsequent to said act No. 57 of 1861. And for the revival

of all of which judgments, as a matter of excessive precaution
10 and not because the same were necessary proper proceedings were in proper time taken in the proper courts and are still pending therein.

11. And your orator further shows that said board of administrators complied with said act 30 of the year 1871, and took possession of all the money, rights, privileges, properties and powers conferred on them, and became possessed of all the means necessary to carry out the objects of the statutes aforesaid and provide for the payment of all drainage warrants that might be issued under said act 30 of 1871 and that the amount of assessments handed over to said city of New Orleans, in the 1st and 2d draining districts was $790,621.42, and the amount of assessments levied and reduced to judgment at the suit of the city of New Orleans in said 3d and 4th draining districts, after she came in control under said act No. 30 of 1871, was $909,915.74, making a total of $1,699,637.16 of which there was assessed against the city of New Orleans on streets and squares as follows: 1st district, $223,110.60; 2d district, $199,885.47; 3rd district $207,441.46; 4th district $65,956.77, and on which assessments there had been collected from individuals by said city of New Orleans, between the time she took charge as aforesaid and the 7th day of June, 1876—the date of the sale from Van Norden and said canal company hereinafter referred to—in cash $78,748.51, and $151,174.18 in drainage warrants, paid in pursuance of an ordinance No. 2460 hereto annexed and made part hereof, leaving outstanding and due on the books and records a balance of $1,469,714.47, including said sums due by the city of New Orleans on said assessments levied on her streets and squares as aforesaid.

12. And your orator further shows that on the 22nd day of May, 1872, said Mississippi & Mexican Gulf Ship Canal Company, by act before Andrew Hero, notary public, for a good and valuable consideration therein expressed, did assign, transfer and set over to Warner Van Norden all and singular the right, title and interest, claim and demand of said canal company in and to the privileges and advantages granted to it under the aforesaid act No. 30 of 1871, as will more fully appear by reference to a copy of said act herewith filed and made part hereof; and on the 22nd day of November, 1872, said canal company by another act before the same notary, for a valuable consideration therein expressed, did sell and deliver unto said Van Norden all of its dredge-boats, derricks, flat-boats and other property used in dredging, as will more fully appear by reference to a copy of said act of sale herewith filed and made part hereof.

13. And your orator shows that from the time said board of administrators took possession and charge in June, 1871, pursuant to said act 30 of 1871, a vast amount of drainage work was done by said canal company and said Warner Van Norden, transferee thereof; twelve miles of old canals were widened and deepened, and thirteen miles of new canals were dug, and a corresponding amount of protection levees were built, and in the doing of which over

5,000,000 cubic yards of earth were handled, and the work so
11 done by said company and said Van Norden, transferee, was in all respects conformable to the acts of the legislature and the designs of said board of administrators, who duly approved and accepted all work done, and was adequate to secure said proposed drainage, and only required the completion of a gap on the shore of Lake Pontchartrain, and the placing in position of the pumping engines on said lake shore—which it was the duty of said city of New Orleans to do under said act 30 of 1871 to complete the entire system.

14. And your orator further shows that by act No. 16 of the legislature of Louisiana, approved March 24, 1876, and made part hereof, the city of New Orleans was authorized and empowered to contract with said Mississippi & Mexican Gulf Ship Canal Company and said Van Norden, as transferee thereof, for the purchase of its said transferee's rights, franchises, tools, implements, machines, and boats and apparatus, the purchase price to be paid in drainage warrants, payable out of drainage taxes imposed under the various acts of the legislature hereinabove set forth, and after due appraisement, on the 6th day of June, 1876, said purchase was made by said city by notarial act (a copy of which, as well as of an inventory of the property sold, and the ordinance under which said inventory was made, are hereto annexed and made part hereof, and marked "transfer 1" and "inventory 1," and ordinance No. 3479, A. S.), the city receiving from said company and said transferee, said boats, machinery, implements and apparatus of great value, for which it agreed and bound itself to pay in drainage warrants $300,000.00 which were delivered to said Van Norden transferee as aforesaid, pursuant to ordinance No. 3539 A. S. copy of which is annexed and made part hereof, and of which your orator is now the owner and holder of three, of $2,000 each, by him endorsed (a copy of one of which is also annexed and made part hereof) all dated June 6th, 1876, upon which this suit is brought, as well as upon the assignment, transfer and subrogation of said Warner Van Norden to your orator, of all his right, title and interest in and to said warrants, as well as of each, any and all right or rights of action which he had or has against said city of New Orleans arising in his favor out of said act of sale of said June 7th, 1876, or the action of the city of New Orleans thereunder by reason of its failure to collect said drainage taxes out of which said warrants given for the purchase aforesaid were payable, or by reason of the failure of the city of New Orleans to complete said drainage work, to the end that said taxes might all be collectible, so as to pay said warrants given for said purchase, or for any other reason, of which a copy is herewith filed and marked "assignment 1," and he brings this suit not only for himself, but for such other holders of said drainage warrants, given for the purchase aforesaid, as may under the invitation hereinbefore extended make themselves parties to this suit.

15. And your orator further shows, that said Van Norden, at the time of parting with said drainage warrants in the year 1876, as well as at the time of making said assignment and transfer marked

"assignment 1" was, and now is at the time of bringing this
12 suit, a citizen of the State of New York and could bring this suit in this hon. court.

16. And your orator further shows that said act of the legislature of Louisiana of February 24, 1876, being No. 16 of that year, providing for the payment of the purchase price of said dredge-boats, tools and implements, by the issuance and delivery of drainage warrants, payable out of drainage taxes, was a new destination of said taxes by the legislature of the State as they then stood, which could not be diverted until said drainage warrants, so given as aforesaid, were fully paid, and placed said taxes beyond any claim that might be urged against them by the city of New Orleans, or any other party or person whomsoever, and especially as said city became the absolute owner of said dredge-boats, franchise and implements without paying any of her own money or property, or giving any personal obligation therefor.

17. And your orator further shows that after said purchase said city of New Orleans alone, became possessed of the sole power, authority, as well as the necessary tools and outfit to complete the contemplated system of drainage, and in fact construct and complete any system of drainage, and had the duty cast upon her to complete said system, or build and complete some other system of drainage, but from the very date of said purchase in June, 1876 (and notwithstanding said drainage work had, from the very commencement thereof by said canal company in 1871, and the prosecution thereof by Van Norden as transferee of said company, from May, 1872, been proceeded with, with great vigor and over two-thirds thereof had been completed) said city of New Orleans ceased all work on said system, and never thereafter commenced or prosecuted any other, but sold some of the boats and machinery so purchased as aforesaid, diverted the proceeds of taxes from other purposes than the payment of drainage warrants, allowed other of said boats to rot and sink unused, and all notwithstanding all were in a first-class condition when received from said vendor, with all the outfit in duplicate parts, so that if any was broken or gave way a counterpart was on hand to take its place, and which with reasonable care would have been useful for ten years from the date of said purchase, and thus rendered herself incapacitated for the completion of the drainage work aforesaid or for any work of drainage whatsoever, and allowed the canals dug by said company and its transferee to fill and remain filled with filth and sediment, and thus became useless and worthless, and in fact destroyed the vast amount of work already done to a very large extent.

18. And your orator further shows that ever since said purchase by said city she has done nothing to compel or enforce the collection and payment of drainage taxes, and but one execution has been issued on said drainage-tax judgments since June, 1876, and when this was enjoined by a preliminary injunction, no steps have ever since been taken to have said injunction tried or disposed of, and in fact said city has done nothing toward the collection of said taxes but keep an office open in the city hall where the agent of

13 Van Norden might try to induce drainage-tax debtors, by persuasion to pay their taxes, where your orator has been informed some taxes have been paid but the amount thereof is unknown to your orator, and the same have never been accounted for, and finally after this system of inaction and supineness, said city of New Orleans on the 5th day of April, 1881, adopted by its common council an ordinance, and had the same published in the daily press of New Orleans, instructing its mayor to issue, and in pursuance thereof he did issue and publish his proclamation advising drainage-tax payers not to pay their taxes (which had a most disastrous effect upon the payment thereof), and by reason of her conduct in not completing the said system of drainage or *and* because thereof, and because she had not adopted any other system of drainage, to drain the land whereon said assessments were imposed and remained unpaid, the supreme court of Louisiana, in the case of Davidson *vs.* New Orleans, in March, 1862 (34 La. Ann., p. 170 to 178) decided said drainage taxes could not be enforced and collected, and this decision, from the date thereof, has become the settled jurisprudence of the State, and been the basis of many suits in the courts of Louisiana, in which large amounts of drainage taxes have been erased and canceled, and all the balance thereof remaining unpaid have become of little or no value; and after the rendition of said Davidson decision said city of New Orleans, on the 15th of May, 1883, in the further prosecution of its purpose to destroy said drainage taxes and dissuade those owing the same not to pay the same, by a report of a committee of its council, duly published, pointed out to the drainage-tax payers how under said Davidson decision they might avoid payment thereof, to wit: by bringing proceedings against said city as trustee of said drainage taxes, and alleging that the drainage work (which it was the duty of the city of New Orleans to complete) had not been completed, and that because thereof said drainage taxes could not be enforced, which suggestion and programme so put forth by said city while trustee of said fund and the collection thereof, has ever since been largely adopted and enforced and very large amounts of drainage taxes have been ordered erased and have been erased and lost in consequence thereof, that when said proceedings were brought said city of New Orleans made no defence whatever, but in accordance with the determination to destroy said fund, never called a single witness to show the value of the work done and the benefits resulting therefrom, and of all of which she had full knowledge, but of the exact extent of said proceedings and the exact amount of drainage fund thereby destroyed your orator has no exact knowledge, except of one case, to wit: the proceedings instituted to cancel and erase the drainage taxes on a portion of the land known as the Foucher tract in the 2d drainage district, to wit: that part thereof lying on the swamp side of St. Charles street between Fabourg Greenville and Fabourg Burtheville, in the suit entitled C. E. Girardy *et al. vs.* Heirs of William Henry, No. 23315 on the docket of the civil district court, where the city of New Orleans, although a party to said proceedings, and having full knowledge of the benefits conferred on said land and other

land in the vicinity by said work of drainage, and that the
14 same was drained never called a single witness to prove the fact but suffered the matter to go by default, and in consequence thereof on the 12th day of June, 1889, the court ordered the drainage taxes assessed against said land amounting to $11,532.00 with 6 per cent. interest per annum from December 7, 1877, and 10 per cent. attorney's fees and costs to be erased and canceled from the drainage records and the mortgage office, which has since been done and said amount has been wholly lost to said drainage fund.

19. And your orator further shows that said city has in other ways and by other means, the details of which are at present unknown to your orator destroyed said drainage fund and discouraged, and advised against the payment of said drainage taxes, until now, as far as the courts of Louisiana are concerned, the same has become uninforcible and worthless to the holders of drainage warrants given for the purchase of the aforesaid dredge-boats, tools, implements and franchise, which said city, from the date of said purchase up to the present time, has not paid for in whole or in part in drainage taxes or otherwise provided any means for the payment of said warrants, or offered any restitution of said property, and all in express violation of an express covenant contained in said act of sale "not to obstruct or impede, but on the contrary to facilitate by all lawful means the collection of said drainage-tax assessments, until said warrants should be paid in full."

20. And your orator further shows that on some occasions said city has claimed said drainage taxes as her own property and been allowed the full benefit thereof in the payment of her own debts, and especially in suit No. 2036, civil district court, and No. 2447, late superior district court for the parish of Orleans, wherein, being sued as indebted to the commissioners of the city park in a large sum of money, she claimed said sum so sued for should be credited with drainage taxes amounting to $25,725.96 assessed against another portion of said Foucher tract in said second drainage district lying between said Fabourg Greenville and Fabourg Burthville aforesaid, and between St. Charles street and the Mississippi river, which credit was allowed to said city in discharge of her own indebtedness, to the expense and loss of said drainage fund, and for which with interest at 6 per cent. per annum from the date of allowance she should account to the holders of said drainage warrants given for said purchase.

21. And your orator further shows that he is advised that said defendant now claims that she has not in her possession any funds realized from drainage-tax assessments, against other property than the streets and property for which she is liable, and that none of the taxes assessed on property of private individuals is now susceptible of collection.

22. And your orator further shows that the plan for draining and reclaiming the land aforesaid, as provided for in said act 30 of 1871, and as supplemented by the board of administrators of said city of New Orleans under the authority given, and the duty imposed on them under said act, and which they neglected and destroyed as

aforesaid, was, *first*, to surround the territory embraced in said
15 four drainage districts with immense levees to prevent any water from flooding the same from without, as follows: On the south by the levee on the bank of the Mississippi river; on the east by a lower protection levee; on the north by the lake-shore protection levee (which was to be not less than 100 feet wide at its base, and of sufficient height to completely protect said land from overflow from the lake); and on the west by an upper protection levee; and, *second*, the plan for removing all water and drainage that might accumulate within the territory so protected from overflow as aforesaid, was, to immediately inside of said protection levees above or on the west, and below or on the east, to dig immense canals leading directly into another immense canal to be dug immediately inside of said lake-shore protection levee on the north, which was to be not less than 65 feet wide and 15 feet deep, which was to serve as a reservoir canal, from which the drainage emptying therein was to be pumped into said Lake Pontchartrain as hereinafter stated; and into said reservoir canal other canals of large size were lead parallel with said canals inside of said upper and lower protection levees, and at proper distances, according to the topography of the land, other and smaller canals were to be dug at right angles and connecting with and emptying in said reservoir canal inside of said lake-shore protection levee.

23. And your orator further shows that said levee on said bank of the Mississippi river was, and ever since the year 1871 has been sufficiently high and strong to protect said enclosed territory from any overflow from said river front and that the land on said river front to Claiborne street in said city (about one-third of the distance from said river to said Lake Pontchartrain), descends or falls towards said lake about 16 feet, while the land at said Claiborne street is only one foot higher than it is at said lake, and that to provide for this condition of things the drainage from the levee on said Mississippi River front was over the surface of the ground, and in the street gutters to Claiborne street aforesaid, where the aforesaid right-angle canals running east and west, and emptying into said upper and lower protection canals were to be dug, and at proper distances continued towards said reservoir canal; and the other canals which lead northwardly from said Claiborne canal and parallel with said upper and lower protection canals and emptying into said reservoir canal were to be begun at or near said Claiborne Street canal, and were to descend from said point gradually increasing in depth until they reached said reservoir canal, at a depth of fifteen feet, thus making a complete and continuous descent or fall for drainage from the levee on the Mississippi river in front to the bottom of said reservoir canal on the inside of said lake-shore protection levee in the rear, of thirty feet or more; and said reservoir canal was at all times to be kept empty and free for the flow of drainage therein, by four immense pumping engines to be built and run by the city of New Orleans (but not from drainage-tax collections), on said lake-shore protection levee over which they were to throw said drainage into said Lake Pontchartrain; and your orator avers that

said plan or system of drainage was well devised, wise, com-
16 plete and sufficient, and had the endorsement of the ablest engineers in the country, and if carried out and completed by said city of New Orleans after the purchase aforesaid, would have protected the lands embraced within said plan from overflow from without, and would have easily, quickly and completely removed all the drainage from within the levees provided for thereby, and rendered the land fit and useful for either agricultural, residence, and business purposes, and made the same of many times the value of all drainage taxes imposed thereon, and said taxes themselves collectible and available for the payment of the drainage warrants given for the purchase aforesaid.

24. And your orator further shows that at the time of said sale by said Van Norden and said canal company to said city of New Orleans said drainage assessments then uncollected—and all exclusive of the taxes imposed on swamp land in the first and second drainage districts, which had been settled for prior to said purchase and sale—amounted to the said sum of $1,469,715.41 and that after said sale and purchase said city had not only the power and authority, the machinery and outfit, to have completed said system of drainage, or to have adopted and completed any other system, that would have drained said lands and made them available for the payment of the drainage warrants given for the purchase aforesaid, but she had in addition to all this, from the very date of said purchase, an unexhausted and unrestrained power of taxation under which, by a tax on all the property within the city of New Orleans, she could have supplied herself with more than sufficient means to have completed said system, or any other system, but in violation of her duty and in utter repudiation of her obligations, she did at once abandon all pretence of draining in any way whatever, and destroyed the very source from which she had bound and obligated herself to pay the warrants given for said purchase, sometimes pretending that said drainage taxes were illegal and unconstitutional by reason of various acts of the legislature of the State, to wit: Act No. 48 of the year 1877, excluding certain lands from all liability for drainage taxes, and canceling and annulling all judgments for drainage of said lands, and all legal proceedings pending therefor, act No. 67 of the year 1877 declaring that no judgment for drainage taxes should be collected until the property had been benefited to an extent equal to the drainage taxes imposed; and section 42 of act 20 of the year 1882, which undertook to abolish all laws providing for drainage, and the drainage-tax assessments and judgments imposed thereunder, all of which your orator avers were illegal, null and void because repugnant to the Constitution of the United States, and especially article 1, section 10, and the 14th amendment of that instrument, prohibiting all legislation impairing the obligation of contracts and protecting the rights of property, and at other times pretending that said taxes were uncollectible because the lands were not worth the amounts imposed thereon—which your orator also avers is without foundation in fact—the only reason (if any) why the land on which said taxes are levied are not worth

the amount of said taxes—which is denied—is because said
17 city of New Orleans has refused to drain them, either by completing the system or by keeping the canals already dug open and clean.

25. And your orator further shows that by said act of purchase and transfer of June 7, 1876, and the stipulations therein contained, said city of New Orleans, in addition to the former duties on her imposed of trustee for the collection and payment of said drainage taxes for drainage warrants, became the voluntary and contractural trustee for the collection of the taxes then due, and was bound to use her utmost efforts for the collection of the same under the terms of said act of sale, and to disregard all the illegal and unconstitutional acts of the legislature aforesaid, and having failed and neglected so to do, and having done everything in her power to destroy said taxes and defeat their collection, and this notwithstanding various suits brought against her for her dereliction of duty in this regard, and especially in the face of the following cases, to wit: John Crossly & Sons, Limited, *vs.* The City of New Orleans, No. 9384, U. S. circuit court, eastern district of Louisiana, filed April 18, 1881, and excepted to May 11, 1881; State of Louisiana, *ex rel.* John Crossly & Sons, Limited, *vs.* City of New Orleans, filed December 28, 1881, in the civil district court, parish of Orleans, and subsequently removed to this hon. court and filed therein on the 22 day of April, 1882, being now No. 9935 on the docket thereof; John Crossly & Sons, Limited, *vs.* The City of New Orleans, No. 10337 on the docket of this hon. court, filed August 24, 1883, and pleaded to Nov. 17, 1883, and James W. Peake *vs.* The City of New Orleans, No. 11614 on the docket of said court, filed August 10, 1887, (the pleading- in which are referred to for greater certainty, and which your orator prays may be taken as a part hereof), she has become accountable to your orator and other holders of drainage warrants for all moneys collected and not paid for drainage warrants, for all moneys misapplied, and also for such sums as might have been collected had said city done her duty in the premises, and which have become lost and wasted, because of said non-fulfilment of her duty as contractural and voluntary trustee, between the time she took charge in June, 1871, to the time a receiver was appointed by this hon. court in June, 1891, in suit No. 12008, on the docket thereof, and more especially between the date of the sale aforesaid from said Van Norden and said canal company on June 7th, 1876, to said June 13th, 1891.

26. And your orator is advised and shows to the court that defendant The City of New Orleans—will set up and plead as a discharge to this suit that she has discharged herself from all liability to account for drainage taxes which she has collected or ought to have collected for the benefit of the holders of said warrants, by the issue and delivery, between May 10th, 1872, and December 31st, 1874, of $1,672,105.21, of her bonds of the drainage series, issued and delivered pursuant to section 17 of act No. 73, of the year, 1872, or some other act, to take up drainage warrants issued for work done pursuant to act No. 30 of the year 1871, but your orator

avers that the city of New Orleans had not at any time prior to the date of said act No. 16, approved February 24th, 1876, 18 or prior to the execution of said contract of purchase dated June 7th, 1876, made pursuant to that act, asserted or claimed that she had ever been so discharged, but had at all times acted upon the theory that said bonds were issued in discharge of a fixed liability cast upon her by said section 17, of said act No. 73 of 1872, and your orator is advised and so charges that said act No. 16 of 1876, was an authority for the city of New Orleans to purchase said drainage boats, tools, implements and franchise, and was a legislative recognition that the drainage fund as created by law, and as it stood on the records of the city of New Orleans, and as recorded in the mortgage office had not been discharged in any manner or to any extent by the issuance and delivery of said bonds, and was an appropriation of so much of said fund as would be necessary to pay the said purchase warrants without offset or impairment by reason of the issue and delivery of said bonds of said drainage series.

27. And your orator avers that the said contract of purchase was entered into in view of and in consideration of the provisions of said act No. 16 of the year 1876, and its effect upon the rights and remedies of the said Van Norden, that neither at the time of entering into said contract, nor when said warrants were delivered in discharge of the price of the sale, did defendant disclose to said Van Norden that she would claim that the issuance and delivery of said bonds had discharged her of liability to account for and apply drainage taxes and funds—including those due by herself, to the payment of the warrants so issued to him, but on the contrary, defendant in and by said contract of sale, and the covenants therein contained, recognized and asserted the existence of said drainage taxes as applicable to the payment of said warrants, and agreed "not to obstruct or impede, but on the contrary, to facilitate by all lawful means, the collection of drainage assessments as provided by law, until said warrants have been fully paid, it being well understood and agreed between the said parties hereto that the collection of drainage assessments shall not be diverted from the liquidation of said warrants and payment of expenses as hereinbefore provided for, under any pretext whatever, until the full and final payment of the same," and said Van Norden, who was ignorant that said city claimed or would claim a discharge from liability on account of the issuance and delivery of said bonds of said drainage series, would not have entered into said contract if he had been advised that any such claim would be made as a defense herein, and so your orator is advised and avers that the defendant is now estopped in equity and good conscience from pleading or maintaining said defence; and your orator avers that he has made amicable demand upon defendant for the payment of his warrants, but without avail.

To the end therefore that said defendant may under oath, according to its best and utmost knowledge, information and belief, full, true and direct and perfect answer make to this bill and the interrogatories hereinafter numbered and set forth at the foot of this bill, and that an account may be taken of all drainage taxes, assess-

ments, and judgments imposed and rendered under acts No.
19 165 of March 18, 1858, No. 191, of March 17, 1859, No. 57 of March 1, 1861, and act No. 30 of 1871, and the various acts of the legislature of Louisiana supplementary thereto and amendatory thereof, and of all moneys collected by said city of New Orleans under the aforesaid acts, and of any and all other assets and property that came to said city of New Orleans under the aforesaid acts of the legislature or any of them, as well as of each, any and all payments, disbursements and dispositions thereof, and that a further account be taken of all losses, waste of, and damage caused by said city of New Orleans to said drainage-tax assessments and judgments by reason of the illegal and wrongful acts of administration, and violation of the duties and obligations imposed on her by said act of sale of June 7th, 1876, or any of them, or from any other cause, and that the sum found to be due on said accounting with interest, may be decreed to be paid to your orator and other parties similarly situated, to the full extent of their warrants with interest thereon, and that the amount of taxes assessed as aforesaid against the city of New Orleans on her streets, squares, and public places, be specially decreed to be a trust fund in the hands of said city, applicable to the payment of said warrants of your orator and such other holders, who may avail themselves of the benefit of these proceedings and offer to pay their share of costs, expenses, and counsel fees herein, and that said city of New Orleans be decreed estopped from setting up any defence of offset thereto or payment thereof by reason of the issuance of said bonds of said drainage series issued and delivered pursuant to said act No. 73 of the year 1872, and that your orator and said other parties similarly situated may have judgment against said city of New Orleans, for the amount of the drainage warrants respectively held by them, with interest and costs, and that he may have such other and further relief and redress as to right and justice may appertain and as the court is competent to give in the premises.

May it please your honors to grant unto your orator a writ of subpœna issuing out of and under the seal of this hon. court directed to said city of New Orleans, on a day certain therein to be named, and under a certain penalty, to appear before this hon. court, then and there to answer all and singular the premises, and to stand to, perform and abide such order, direction and decree as may be meet and agreeable to equity and good conscience, and your orator as in duty bound will ever pray.

(Signed) RICHARD DE GRAY,
ROUSE & GRANT,
Solicitors for Complainants.

Interrogatories to be Propounded to said Defendant, The City of New Orleans.

Interrogatory No. 1. What are respective amounts of drainage taxes which have been erased and canceled under order and judg-

ment of court since the decision and decree of the supreme
20 court of Louisiana rendered in suit entitled Davidson *vs.* City of New Orleans, No. 8260, reported in 34th An., page 170, and following, what were the courts in which the same were so ordered to be erased and canceled, what were the titles of the cases or proceedings, and the numbers thereof, what was the description and location of the land from which said taxes were ordered to be erased and canceled, state the matter in full.

NOTE.—The defendant, The City of New Orleans, is required to answer interrogatory No. 1.

(Signed) RICHARD DE GRAY,
ROUSE & GRANT,
Solicitors for Complainant.

Ordinance No. 1359, *Creating* 4 *Drainage District.*

Annexed to and made part of bill of complaint and filed Nov. 26, 1894.

Ordinance Number 1359.

Ordinance creating the 4th draining district and establishing location of protecting levees.

MAYORALTY OF NEW ORLEANS,
CITY HALL, *February* 7, 1872.

SEC. 1. Be it ordained by the council of the city of New Orleans, That in addition to the several drainage districts described in an act of the legislature to provide "leveeing, draining and reclaiming swamp lands in certain portions of the parishes of Orleans and Jefferson," approved March 18, 1858, there shall be and is hereby constituted a fourth district or section, to be comprised within the following-described limits or boundaries, viz:

Commencing on the left bank of the River Mississippi, at a point of intersection with Lafayette avenue, thence continuing down said river to the point of intersection with Fisherman's canal, thence running back from said river a distance of 9,900 feet, or thereabouts, to Bayou Bienvenue and Florida walk, thence continuing along Florida walk for a distance of 15,914 feet or thereabouts, so as to connect through a curved line of 338 feet additional with Lafayette and People's avenue at a point distant from the Mississippi river of 9,900 feet or thereabouts, and thence along Lafayette avenue to the place of beginning.

SEC. 2. Be it further ordained, That the Lower Line protection levee to connect the Mississippi river with Lake Pontchartrain is established as follows:

Commencing on the left bank of the Mississippi river, at the lower limit of the fourth draining section, thence back from said river to the intersection of Bayou Bienvenue and Florida walk a distance of 9,900 feet or thereabouts; thence on the rear line of said section along Florida walk to Lafayette and People's avenue a distance of

15,914 feet or thereabouts; thence along People's avenue to
21 the intersection with Mexico street, a distance of 13,434 feet or thereabouts; thence with a northwest bearing for a distance of 3,450 feet or thereabouts to the intersection of Washington avenue and the lake-shore protection levee.

SEC. 3. Be it further ordained, That this ordinance shall take effect from and after its passage.

Adopted by the city council of the city of New Orleans, February 6, 1872.

Yeas—Cockrem, Shaw, Delassize, Remick, Lewis, Walton, Bonzano.

(Signed) BENJ. F. FLANDERS, *Mayor.*

EXHIBIT "A."

Proceedings in the matter of the commissioner of the first draining district, praying a decree of mortgage privilege, etc., rendered by the third district court of New Orleans in suit No. 16269 on the docket of said court on the 24th day of August, 1861.

Filed with and made part of bill November 26, 1894.

Nos. 16269 and 17028, late 3d district court, parish of Orleans, transferred to No. 9189, 7th dist. court, parish of Orleans; transferred to 25935, superior district court for the parish of Orleans; transferred to No. 5758 of the civil district court, parish of Orleans.

To the honorable the third district court of New Orleans:

(Stamps.)

The petition of the board of commissioners of the first draining district, through its president, N. E. Bailey, respectfully represents: That agreeably to the provisions of an act entitled "An act to provide for leveeing, draining and reclaiming swamp lands in certain portions of the parishes of Orleans and Jefferson" approved March 18, 1858, your petitioners have had a plan drawn by G. T. Beauregard, engineer of said draining district, of a certain section of land within the parish of Orleans, described in the advertisements hereunto annexed and made part of this petition—that said plan accurately designates the limits of said section and as much as possible the subdivision of property therein contained and the names of the proprietors, and also the divisions and directions of the canals intended to be dug and the places where the steam-engines are to be established, that true copies of said plans were deposited in the office of the recorder of mortgages of the parish of Orleans, on the 4th day of May, 1861, and notices inserted in the English and French languages in the New Orleans *Commercial Bulletin* and in the New Orleans *Bee*, two newspapers published in the city of New Orleans, once a week during four weeks in succession, announcing that your petitioners were about to proceed to drain said section, describing the place where said plans are deposited, accurately defining the limits of said section, and indicating, as near as possible,

the time within which the draining thereof will be completed,
22 and the probable cost of said works; all of which will more fully and accurately appear by reference to the certificate of the recorder of mortgages of the parish of Orleans, and copies of said New Orleans newspapers containing said notices herewith filed.

The premises considered, your petitioners are entitled to and now pray this honorable court to render a decree subjecting each portion of the property, situated within the limits of said first draining district, to a first-mortgage privilege and lien in favor of your petitioners, The Board of Commissioners of the First Draining District, for such amount as may be assessed on it for its proportion of the whole cost of drainage of said section, in accordance with the provisions of the statute by which said privilege lien and mortgage are created, and interest thereon at the rate of 6 per centum per annum, from the demand thereof; and your petitioners pray for all such other and further aid, relief and remedy as the nature of their case may require and the law will permit; and they will ever pray, etc.

(Signed) C. ROSELIUS,
Attorney for Petitioners.

Endorsed: No. 16269. Third district court of New Orleans. In the matter of the Board of Commissioners of the First Draining District, praying for a decree of mortgage lien and privilege, etc. Filed Aug. 21, 1861. Signed A. Denis, d'y cl'k.

Judgment.

Proof having been made of the publications required by law and of the deposit of the plan in the office of the recorder of mortgages of the parish of Orleans by the commissioners of first draining district agreeably to the provisions of law, it is hereby ordered, adjudged and decreed that each portion of the property situated within the limits of the parish of Orleans comprised within the first draining district, beginning at the Mississippi river at Julia street, following said street to the canal of the Canal and Banking Company, following said canal as far as Lake Ponchartrain, along said lake to Bayou St. John, following said bayou to Canal Carondelet, along said canal to St. Peter street, along St. Peter street to the bank of said River Mississippi, and following the bank of the said river to the starting point, be and the same is hereby subjected to a first-mortgage lien and privilege in favor of said board of commissioners of the first draining district for such amount as may be assessed on it, for its proportion of the whole cost of draining of said section, together with interest thereon at the rate of 6 per centum per annum from demand until final payment.

Judgment rendered and signed August 24, 1861.

(Signed) R. K. HOWELL,
Judge 6th D. C., Acting in Absence of Judge Foute.

A true copy.
DON GORDON,
D'y Clerk, C. D. C.

23 EXHIBIT "HOMOLOGATION 1."

From page 5, with copy of assessment-rolls annexed.

Petition.

Filed Feb'y 5th, 1863.

STATE OF LOUISIANA:

Third District Court for the Parish of Orleans. No. 17028.

In the Matter of the Commissioners of the First Draining District Praying for the Homologation of Assessment-roll, etc.

Petition.

Filed Feb'y 5, 1863.

The petition of commissioners of the first draining district, respectfully represents: That in conformity with the act of the legislature entitled "An act to provide for the collection of the assessment for draining under the acts of March 18th, 1858," and the act supplementary thereto of 17th March, 1859, a tableau or assessment-roll of the amount to be paid for draining the property within the said first draining district has been prepared and notice thereof has been given.

That petitioners herewith present a copy of said assessment to be filed in this honorable court.

That in the said assessment-roll the property assessed is set forth together with the amounts assessed and the names of the owners thereof as far as known and in case the owner or owners are unknown said fact is stated all of which together with other necessary particulars will more fully appear by reference to said copy of the assessment-roll herewith exhibited and filed.

Your petitioners therefore respectfully pray that in pursuance to said act of the legislature it may please the court to order that all persons whom it may concern do show cause within thirty days from the first publication of said order if any they have why said assessment-roll should not be approved and homologated.

That said order be published in the English and French languages in the *Daily Delta* and the New Orleans *Bee* newspapers twice each week for thirty days. And that after due proceedings had judgment be rendered approving and homologating said assessment-roll to operate as a judgment against the property assessed and the owner or owners thereof for the amount of the assessment with 10 per cent. in addition to the amount assessed to pay costs and counsel fees, the whole according to the acts of the legislature aforesaid found at pages 43 and 44 of the Printed Session Acts of 1861.

And your petitioners pray for all such other and further
24 aid, relief and remedy as the nature of the case may require and the law will permit.

And as in duty bound they will ever pray, etc., etc.

(Signed) C. ROSELIUS,
Att'y for Petitioners.

Order of Homologation and Judgment.

STATE OF LOUISIANA:

Third District Court for the Parish of Orleans. No. 17028.

In the Matter of the Commissioners of the First Draining District Praying for the Homologation of the Assessment-roll.

Order of homologation and judgment rendered March 11, 1863.

On motion of Christian Roselius, Esq., of counsel for petitioners and on producing to the court due proof of the publication of notices to all persons interested to show cause, if any they have, why said assessment-roll filed by said commissioners should not be approved and homologated was made according to law.

It is now ordered, adjudged and decreed that said report be approved and homologated as far as not opposed and to operate as a judgment against the property assessed or the owner or owners thereof with ten per cent. in addition to the amount assessed — costs of counsel fees, according to act of legislature.

Rendered March 11th, 1863.

Signed March 17th, 1863.

(Signed) E. HUSTAND, *Judge.*

I do hereby certify, pages five, six and seven of the foregoing pages contain a true and correct copy of a certified copy thereof to be found in record No. 7063 of the supreme court of the State of Louisiana in suit entitled New Orleans Canal and Banking Company *vs.* The City of New Orleans on appeal from the sixth district parish of Orleans wherein the same was offered and filed, and the original of which cannot be found among the records of the late courts transferred to the civil district court of the parish of Orleans.

DON GORDON,
D'y Clerk Civil District Court.

25 No. 9189. Late seventh district court, transferred into No. 16269 of the late third district court; transferred to 29935, superior district court; transferred to the civil district court, No. 5758, parish of Orleans. Filed April 3, 1882.

Petition.

9189. Seventh District Court for the Parish of Orleans. No. —.

In the Matter of the Commissioners of the First Draining District Praying for a Decree, etc.

Petition of the city and administrators of New Orleans praying for the homologation of the assessment-roll for said district.

To the Hon. T. W. Collins, judge:

The petition of the city of New Orleans and the administrators thereof composed of Benjamin F. Flanders, president, and John S. Walton, Alfred Shaw, Louis T. Delassige, Hubert Bonzano, James Lewis, John Cochrane and F. C. Remick residing in said city and parish, all said petitioners appearing as the representatives of the persons assessed for the payment of the expenses of leveeing and draining of the first draining district and representing also the interests of the State of Louisiana and of said city; and herein proceeding for the use of the persons and corporations represented as aforesaid, respectfully represents:

That in conformity with the act of the General Assembly of this State entitled "An act to provide for the collection of the assessments for drainage under the acts of March 18, 1858, and the act supplementary thereto of March 17, 1859," a tableau or assessment-roll of the amount to be paid for draining the property within the first draining district, within the parish of Orleans from the second to the tenth annual instalment, inclusive, has been prepared and notice thereof duly given; that your petitioners herewith present a copy of said assessment-roll to be filed herewith in this court; that in said assessment-roll the property assessed is set forth and described, together with the amounts assessed and the names of the owners thereof, as far as known, and in case the owner or owners are unknown, said fact is stated; all of which, together with other necessary particulars, will more fully appear by reference to said copy herewith exhibited and filed and contained in a folio volume marked "B," consisting of three subdivisions, the first entitled "Book No. 1 B," the second, "Book No. 2 B," the third, "Book No. 3 B," together with a recapitulation.

That said assessments have been open for the inspection of the persons whose property was assessed for many months, and said persons were notified duly by public advertisement, but they have neglected to pay the amount due by them respectively to the common fund of all, as set forth in said assessment-roll.

That your petitioners, herein appearing in the capacity aforesaid, have been, by act of the General Assembly of the State, entitled

"An act to provide for the drainage of New Orleans," num-
26 bered 30 of the Acts of the Session of 1871 "subrogated to all the rights, powers and facilities possessed and enjoyed by the commissioners of the several draining districts, or of any other corporation charged with the duty of draining and leveeing within the limits of the city of New Orleans and Carrollton," and authorized and directed to collect the balance due on the assessments as shown by the books of the first, second, and third draining districts, under the acts of March 18, 1868, March 17, 1859, and the several supplementary and amendatory acts thereto; and directed to execute and enforce the said assessments according to existing laws which said assessments are by said act of 1871 declared to be confirmed and made eligible.

Your petitioners therefore pray that it may please the court to order that all persons whom it may concern do show cause within thirty days from the first publication of said order, if any they have, why said assessment-roll should not be approved and homologated; that said order be published in the English and French languages in the official journal twice each week for thirty days; and that after due proceedings had, judgment be rendered approving and homologating said assessment-roll, to operate as a judgment against the property assessed and the owners thereof respectively—that is to say, a judgment against each property described in said assessment-roll for the amount assessed against it and remaining unpaid and against the owner or owners of each property set forth in said roll for the amount assessed against his or their property respectively, for the purpose of defraying the expenses of the draining and leveeing the said first district as contemplated by law and by the acts of the legislature aforesaid, with ten per centum in addition to the amount assessed to pay costs and counsel fees, and six per centum per annum interest on each amount assessed from the date of the assessment in accordance with law.

And your petitioners pray for all general and equitable relief. And as in duty bound, etc., etc.

(Signed) RUFUS WAPLES,
Attorney for Petitioners.

Endorsed: "Seventh district court, parish of Orleans. No. 9189. In the matter of the Commissioners of the First Draining District praying for a decree, etc., etc. Petition of the city and administrators of New Orleans for the homologation of the assessment-roll for said district, for the annual instalments from the second to the tenth inclusive. Filed Dec. 7th, 1871. H. J. Dussor, d'y cl'k."

Judgment.

Judgment entered 15th April, 1872.

For the reasons this day assigned in writing and filed herein, it is ordered and decreed that the motion to homologate the tableau and assessment filed herein on the 7th December, 1871, be refused; that said tableau and assessment be vacated and rejected and that

plaintiff have leave and the right be reserved to said plaintiff
27 to present a new tableau and assessment according to law, and to demand the reimbursement of the actual and lawful costs of establishing the draining district from time to time as the work shall have actually progressed. It is further ordered that the city of New Orleans be condemned to pay the costs of these proceedings to date.

Judgment signed 19th April, 1872.

(Signed) T. WHARTON COLLINS, *Judge.*

A true copy.

DON GORDON, *D'y Clerk.*

Motion.

Seventh District Court, Parish of Orleans.

In the Matter of the Board of Commissioners of the First Draining District Praying, etc.

On motion of Rufus Waples, attorney for the city of New Orleans, the petitioner for the homologation of the assessment-roll herein filed and on suggesting that said petitioner feels aggrieved by the final judgment rendered herein on the 15th and signed on the 19th inst. against the prayer of your petitioner; and that there is error in said judgment to the prejudice of said city, and those by it represented; and on further suggesting that said city is desirous of appealing from said judgment and to suspend its operation pending said appeal; it is ordered—

That a suspensive appeal be granted to the city of New Orleans, returnable to the supreme court on the third Monday of May next—the time being insufficient to prepare the record for the first Monday of May—the city of New Orleans being exempt by law from giving bond and security upon appeals.

Endorsed: "9189. 7th dist. court. In the matter of the Commissioners of First Draining Dist. praying, etc. Motion of appeal. Filed 19th April, '72. Gasp. Janin, d'y cl'k."

A true copy.

DON GORDON, *D'y Clerk.*

28 No. 9189. Seventh district court, parish of Orleans, transferred to No. 25395, third district, parish of Orleans, and from that court transferred to the superior district court, parish of Orleans, and from the last-named court transferred to No. 5758, civil district court, parish of Orleans.

Judgment Homologating Assessment-roll.

Decree of supreme court.

Superior District Court, Parish of Orleans.

Extract from the Minutes of Saturday, March 21st, 1874.

Present: The Hon. Jacob Hawkins, judge.

No. 25935. Superior District Court.

In the Matter of the Commissioners of the First Draining District Praying for Homologation of Tableau, etc.

In this case an appeal having been taken to the supreme court of La. the decree of said court was this day filed and ordered to be recorded, and is as follows:

It is therefore ordered that the judgment appealed from be reversed and that the oppositions herein be dismissed at the costs of the opponents respectively.

And it is further ordered that the assessment-roll herein, except that portion designated in Book 2 B on said roll, be and is hereby approved and homologated and this approval and homologation shall operate as a judgment against the property described as assessed in said roll and also against the owner or owners thereof with 10 per cent. in addition to the amount assessed to pay costs and counsel fees.

The case having been reopened on rehearing for certain restricted purposes the following amendatory decree was rendered on the 9th of February, 1874:

It is therefore ordered that the rehearing asked for by the estate of Davidson be refused, and it is further ordered that our decree be amended by striking therefrom the phrase "except the portion designated in Book No. B," that the said portion of the assessment-roll be embraced in this judgment of homologation and that as thus amended the said decree remain undisturbed.

I, Don Gordon, deputy clerk of the civil district court of the parish of Orleans, do hereby certify that the foregoing pages, to wit, one, two, three and four, are true copies of the original on file in the clerk's office, civil district court, parish of Orleans; that pages 5, 6 and 7 are true and correct copies of a certified copy of the original to be found in the record No. 7063 of the supreme court of Louisiana, the original being missing from said office; that pages 8, 9, 10, 11, 12 and 13 are true and correct copies of the originals on

file in clerk's office; that pages 14 and 15 are true and cor-
29 rect copies of a certified copy of the original to be found in record No. 7063 of the supreme court of Louisiana, the original being missing from said office, and that no answers or oppositions were filed to any of the above proceedings by the city of New Orleans as appears from the several dockets of the several late courts in which said proceedings were had, and I do further certify that said foregoing judgments are final and executory and that the copy of assessment-rolls referred to in said foregoing judgments homologating said assessment-rolls cannot be found in said clerk's office, and in lieu thereof I annex hereto a duly certified copy of extract for said original assessment-roll duly certified to by W. T. Mayo, book-keeper, city hall, and dated December 13, 1886, and marked O. K. 1 and O. K. 2.

[SEAL.] (Signed) DON GORDON,
D'y Clerk Civil District Court, Parish of Orleans.

Receipt of Recorder of Mortgages Referred to Foregoing Petition.

Filed August 24, 1861, in foregoing pages 1 and 2.

(Stamp.)

Original.

Received from the draining commissioners of the first draining district a plan and tableaux of the first draining section of this city comprising within the limits commencing at the Mississippi river and Julia street, following Julia street to the canal of the canal and banking company, along said canal to Lake Pontchartrain, along said lake to the Bayou St. John, along said bayou to Canal Carondelet, along said canal to St. Peter street, along said street to the river along the river bank to the place of beginning, which plan and eight volumes of tableaux are hereby deposited in accordance with the seventh section of the act of the legislature of Louisiana, approved March 18, 1858, and amendments thereto approved March 17, 1859.

(Signed) EMILE LA SERE, *Rec.*

New Orleans, May 4, 1861.

Endorsed: Receipt for tableaux and plan of 1st draining district, New Orleans, deposited in mortgage office May 4, 1861. 15846. Filed Aug. 24, 1861. A. Den-s, d'y clerk.

(The above is now No. 5758 civil dist. court), a true copy of the original under the above No. civil district court.

DON GORDON,
D'y Clerk, C. D. Court.

30 *Proof Publication Referred to in Foregoing Judgment of Aug. 24, 1861.*

In foregoing pages 3 and 4.

STATE OF LOUISIANA:

Third District Court of New Orleans. No. 15846, Now No. 5758, C. D. Court.

In the Matter of the Board of Commissioners of the First Draining District.

A. Denis being duly sworn says that the notices of the Board of Commissioners of the First Draining District that they will proceed to drain that portion of the city of New Orleans comprised in the limits of said first draining district have been published in the French and English languages as follows, to wit: in the New Orleans *Commercial Bulletin* on the 9th, 13th, 20th and 27th May, 1861, and in the New Orleans *Bee* on the 6, 13, 20 and 27 May, 1861.

(Signed) A. DENIS.

Sworn to and subscribed before me Aug. 24, 1861.

(Signed) OSCAR LE BLANC, *D'y Clerk.*

No opposition filed.

A. D.

Endorsed: 15846. 3rd dist. court. In the matter of the Board of Commissioners of the First Draining District. Proof of publication filed Aug't 24, 1861. A. Denis, d'y cl'k.

A true copy.
DON GORDON,
D'y Clerk, C. D. C.

Order on foregoing petition filed Feb'y 5th, 1863, pages 5 and 6 of the foregoing pages. No. 17028 of the docket, 3rd district court.

Order Annexed to Petition.

Upon filing the assessment-roll of the first draining district and on the petition of the commissioners of said district it is ordered that all persons whom it may concern do show cause, if any they have, within thirty days from the first publication of this order why said assessment-roll should not be approved and homologated, and it is further ordered—

That said order be published in the English and French languages in the *Daily Delta* and the New Orleans *Bee* newspapers twice each week for thirty days.

New Orleans, Feb'y 5th, 1863.

(Signed) E. HIESTAND, *Judge.*

31 *Publication.*

STATE OF LOUISIANA:

Third District Court for the Parish of Orleans. No. 17028.

In the Matter of the Commissioners of the First Draining District Praying for the Homologation of Assessment-roll, etc., etc.

Notice.

Extract from the *Daily Delta* published February 7, 1863.

STATE OF LOUISIANA:

Third District Court for the Parish of Orleans. No. 17028.

Notice is hereby given to all persons whom it may concern to show cause, if any they have, within thirty days from the publication of this order why the assessment-roll of the Commissioners of the First Draining District filed in this case should not be approved and homologated according to law.

(Signed) C. F. BERENS, *Cl'k.*

New Orleans, Feb'y 5, 1863.

STATE OF LOUISIANA:

Third District Court for the Parish of Orleans. No. 17028.

In the Matter of the Commissioners of the First Draining District Praying for the Homologation of the Assessment-roll, etc., etc.

Notice Published in the Daily Delta Feb. 7th, 1863.

Notice is hereby given to all persons whom it may concern to show cause if any they have within thirty days from the publication of this order why the assessment-roll of the Commissioners of the First Draining District filed in this case should not be approved and homologated according to law.

(Signed) C. F. BEHRENS, *Clerk.*

New Orleans, 5th February, 1863.

Feb. 7 2 ta w 30d.

STATE OF LOUISIANA:

Third District Court for the Parish of Orleans. No. 17028.

In the Matter of the Commissioners of the First Draining District Praying for the Homologation of Assessment-roll, etc., etc.

Notice.

STATE OF LOUISIANA:

Third District Court for the Parish of Orleans. No. 17028.

Notice is hereby given to all persons whom it may concern to

show cause if any they have within thirty days from the first
32 publication of this order why the assessment-roll of the Commissioners of the First Draining District filed in this cause should not be approved and homologated according to law.

(Signed) C. F. BERENS, *Clerk.*

New Orleans, Feb. 5th, 1863.

Feb. 7, 30d 2 t w.

STATE OF LOUISIANA:

Third District Court for the Parish of Orleans. No. 17028.

In the Matter of the Commissioners of the First Draining District Praying for the Homologation of the Assessment-roll, etc., etc.

Notice.

Published in the New Orleans *Bee*, February 7, 1863.

Notice is hereby given to all persons whom it may concern to show cause if any they have within thirty days from the first publication of this order, why the assessment-roll of the Commissioners of the First Draining District should not be approved and homologated according to law.

New Orleans, February 5, 1863.

(Signed) C. F. BERENS, *Clerk.*

Feb. 7. 30d. 2 a w.

STATE OF LOUISIANA:

Third District Court for the Parish of Orleans. No. 17028.

In the Matter of the Commissioners of the First Draining District Praying for the Homologation of Assessment-rolls, etc., etc.

Notice—In French.

Extract from the New Orleans *Bee* (*L'Abeille de la Nouvelle Orleans*) published February 7, 1863.

Etat de la Louisiane, Troisieme Cour de District, Pariosse d'Orleans. No. 17028.

Avis est donné a tous ceaux que cela pent concerner de farre connaitre, dans les trente pours que suivront la premére publication de cet ordre, les raisons pour lesquelles la tableau d'assessment des commissaires au premiere district de assessehement enregistre dans cette affaire ne suait pas approuve et homologue conformement a la loi.

(Signe) C. F. BERENS, *Greffier.*

v feu 1 m 2 fo 5.

33 STATE OF LOUISIANA:

Third District Court for the Parish of Orleans. No. 17028.

In the Matter of the Commissioners of the First Draining District Praying for the Homologation of the Assessment-roll, etc., etc.

Notice in French.

Published in the New Orleans *Bee* (*L'Abeille de la Nouvelle Orleans*) Feb'y 7, 1863.

Etat de la Louisiana, Troisseme Cour de Destrict, Paroisse d'Orleans. No. 17028.

Avis est donné a tous ceux que cela pent concernes de faire connaitre dans les trente jours qui suivront la premiére publication de cet ordre, les raisons pour lesquelles la tablau d'assessment des commissaires au premier destrict de dessechement enregistre dan cette affaire ne Suait pas approuve et homologue conformement a la loi.

(Signe) C. F. BERENS, *Greffier.*

7 feb 1 m 2 p s.

Proof of Publication.

STATE OF LOUISIANA:

Third District Court for the Parish of Orleans. No. 17028.

In the Matter of the Commissioners of the First Draining District, etc.

Proof of publication. Filed March 11, 1863.

Mr. G. *Ingram*, being duly sworn in open court, says:

The notices to all persons interested in the matter of the Commissioners of the First Draining District praying for the homologation of assessment-roll, etc., were published in the New Orleans *Bee* on the 7th February, and for thirty days thereafter in French and English, and also in the *Daily Delta* for thirty days in French and English in said newspaper, both of which are published in the city of New Orleans.

34 Extract from Minutes, Seventh District Court, of December 5, 1871.

Motion and Order to File Record.

Filed December 5, 1871.

STATE OF LOUISIANA:

Seventh District Court for the Parish of Orleans. No. 9189.

In the Matter of the Commissioners of the First Draining District Praying, etc.

Motion and order to file record.

On motion of Rufus Waples, attorney for the city of New Orleans and of the administrators thereof as collectors of the assessments in the first drainage district, and on suggesting that he herewith presents the record 16269 of the late third district court of New Orleans, and on further suggesting that it contains the proceedings on which the judgment decreeing mortgage and privilege on the property to be drained in said district, and therefore properly forms the basis of the proceedings heretofore had in the above-entitled case it is ordered—

That the record herewith presented transferred from the third district court be filed in this court in the case No. 9189. (Order granted on petition filed Dec. 7th, 1871, pages 9, 10 and 11 of foregoing pages.)

Order.

Upon the filing of the assessment-rolls showing the amounts due by the persons and property assessed in the first draining district within the parish of Orleans from the second to the tenth annual instalment inclusive, the city and administrators of New Orleans charged with the collection of said amounts and the management of affairs of said district, it is ordered that all persons whom it may concern do show cause if any they have within thirty days from the first publication of this order why said assessment-roll should not be approved and homologated.

And it is further ordered that said order be published in the English and French languages in the official journal the New Orleans *Republican* newspaper twice each week for thirty days.

New Orleans, December 7, 1871.

(Signed) T. WHARTON COLLINS, *Judge.*

35 *Proof of Publication.*

Filed January 15, 1872.

Seventh District Court. No. 9189.

In the Matter of the Commissioners of the First Draining District Praying, etc.

Proof of publication.

Filed 15th January, 1872. (Signed) E. James, d'y cl'k.

The undersigned appointed by the hon. court expert, and duly sworn in open court to examine the publications of the notices calling on all parties concerned to show cause within thirty days why the assessment-roll herein filed should not be approved and homologated—

Reports that the notices were published in the English and French languages as required by the orders of this court herein made the 7th December, 1871, in the newspaper called the New Orleans *Republican* on the 10th, 14th, 20th, 23d, 27th, 29th December, 1871, and on the 2nd, 5th, 10th and 11th January, 1872, and twice a week.

Respectfully submitted.

(Signed) E. JAMES,
D'y Cl'k 7th District Court.

New Orleans, January 15, 1872.

Proof of Publication.

STATE OF LOUISIANA:

Seventh District Court for the Parish of Orleans. No. 9189.

In the Matter of the Commissioners of the First Draining District Praying for a Decree, etc., etc.

Petition of the city and administrators of New Orleans praying for the homologation of the assessment-roll for said district.

Notice.

Published in New Orleans *Republican* newspaper of the following dates: Dec. 10, 14, 20, 23, 27, and 29, 1871, and Jan'y 2, 5. 8, 10, 11, 1872, to show cause why assessment-roll herein should not be approved and homologated.

Order.

Upon the filing of the assessment-roll showing the amounts due by the persons and property assessed in the first draining district within the parish of Orleans from the first to the tenth annual instalment inclusive and upon the petition of the city and ad-
36 ministrators of New Orleans charged with the collection of said amounts and the management of the affairs of said district—

It is ordered that all persons whom it may concern do show cause, if any they have, within thirty days from the first publication of this order, why said assessment-roll should not be approved and homologated, and it is further ordered that said order be published in the English and French languages in the official journal, the New Orleans *Republican* newspaper, twice each week for thirty days.

New Orleans, December 7, 1871.

(Signed) T. W. COLLINS, *Judge.*

A true copy.

(Signed) A. D. BERNOUDY, *Clerk.*

Etat de la Louisiane, Septienne Cour de District pour la Paroisse d'Orleans. No. 9189.

Dans l'affaire des Commissaires du premier destrict de Dessechement de mandant un decret, etc. Petition de la ville et des administrateurs de la Nouvelle Orléans demandant l'homologation du role d'assessment du dit destrict.

Ordre.

Sur l'enliassement du role d'assessement deur ontrant les moulants dues par les personnes et les propriétés assessees dans le Premier District la Dessechement de la Paroisse d'Orleans charges de la collection des dits moutants et de la direction des affaires du dit district il est ordonne que toules les personnes interessees donnent leurs raisons si elles en ont dans les trente jours sevivant la premierie publicion de cet ordre pour lesquelles le fit role d'assessement ne servait pas approuve et homoloque.

Et il est en plus ordonne que le dit ordre soit public en englais et en francais dans le journal official le Republicanne de la Nouvelle Orleans deux fois pas semaine pendant trente jours Nouvelle Orléans.

(Signé) T. WHARTON COLLINS, *Judge.*

Pour copie conforme.

(Signé) A. D. BERNOUDY, *Greffier.*

STATE OF LOUISIANA:

Clerk's Office, Civil District Court, Parish of Orleans.

I, Don Gordon, deputy clerk of the civil district court, parish of Orleans, do hereby certify that the foregoing pages 17 and 18 contain true and correct copies of the original on file in the clerk's office of said civil district court, and that pages 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31 and 32 contain a true and correct copy of a duly certified copy thereof to be found in record No. 7063 of the supreme court of the State of Louisiana in suit entitled New Orleans Canal and Banking Company *vs.* The City of New Orleans on appeal from the late sixth district court, parish of Orleans, wherein said originals were offered and filed and that the originals cannot

be found among the records of the late courts transferred to
37 the civil district court of the parish of Orleans nor in said clerk's office of said civil district court.

[SEAL.] (Signed) DON GORDON,
D'y Clerk Civil Dist. Court.

No. 17028.

Assessment-roll of the First Draining District.

Filed February 5, 1863. (Signed) C. F. Berens. Rendered March 11, 1883. Signed March 17, 1863. (Signed) E. Hiestand, judge.

In the 3d District Court, New Orleans, La.

Extracts from the original assessment-roll of the first drainage district on file in the comptroller's office, city of New Orleans, of which copy was filed in the third district court, parish of Orleans, on the 5th day of February, 1863, in suit No. 17028 of said court, and homologated by judgment of that court rendered on the 11th and signed on the 17th March, 1863.

City of New Orleans.

Remarks.		Square.	Lot.	Area.	Amount.
	City of New Orleans	9	3	296	09
	Do.	"	4	1,186	39
	Engine-house No. 7	68	18	4,105	1 35
	" " Basin St	123	11	2,775	91
	Bienville school	185	5	8,310	2 74
	Levee ground	1C	Sqr.	23,213	7 66
	Do.	2C	"	28,422	9 38
	Do.	3C	"	44,568	14 17
	Do.	4C	"	43,645	14 40
	Do.	5C	"	28,574	9 43
	Do.	6C	"	26,815	8 84
	Do.	1B	"	26,127	8 62
	Do.	2B	"	34,325	11 32
	Do.	3B	"	44,479	14 67
	Do.	4B	"	43,654	14 40
	Do.	5B	"	28,584	9 43
	Do.	6B	"	26,787	8 84
	Lafayette square	176	"	120,713	39 83
	Public school	180	11	15,035	4 60
	Recorder's court	219	11	6,732	2 22
	Washington artillery	"	29	2,528	83
	Engine-house No. 5 (Girod St.)	"	30	3,504	1 16
	Do. "	"	31	2,643	87
	Do. No. 13 (Perdido)	221	14	2,666	88
	Do. (La. hose carriage)	"	18	2,817	93
	Poydras market	260	Sqr.	13,209	4 35
	Do.	272	"	11,742	3 87
	Fisk school	332	18	3,125	1 03
	Do.	"	19	3,125	1 03
	Do.	"	20	3,125	1 03
	Do.	"	21	3,125	1 03
	Do.	"	22	3,125	1 03
	City of N. Orleans	261	12	1,378	45
	Engine-house No. 14	339	11	3,306	1 09
	City hall	220	2.3.4	22,302	7 36
	City of New Orleans	470	6	2,975	98
	Do.	"	7	2,975	98
	Do.	"	8	2,975	98
	Do.	"	9	2,975	98
	Do.	"	10	2,975	98
	Do.	"	11	2,975	98

Remarks.		Square.	Lot.	Area.	Amount.
38	City park (55 squares).	Various Nos.	Sqrs. 7.36	9,500	2,431 94
	Oak house	345	Sqr.		
	House of Refuge	361½	"	"	
	Protestant	377	"	267,192	88 17
	Cemetery.	396	"		
					$2,736 58

City of New Orleans.

Remarks.	Name of streets.	Area.	Amount.
The streets running from the river to Claiborne street are calculated the whole length. The streets running at intersections are calculated the whole length less the intersections of other streets.	North half of Julia street to Rampart	132,441	
	Florida walk from Rampart to Claiborne	314,550	
	Notre Dame	66,130	
	Girod from Levee to Liberty	234,916	
	Lafayette from Levee to Claiborne	321,695	
	South street, south of Lafayette sqr.	15,732	
	North " north " " "	15,723	
	Poydras street from Levee to Claiborne	465,683	
	Natchez street	19,955	
	Commercial alley	8,184	
	Perdido street from Levee to Claiborne	161,580	
	Union "	36,522	
	Gravier " from Levee to Claiborne	242,308	
	Common " " " " "	373,684	
	Gasquet " " Basin " "	83,634	
	Canal " " Levee " "	902,964	
	Custom-house street from Front to Claiborne	213,213	
	Bienville " " Clay " "	197,981	
	Conti street from New Levee " "	185,935	
	St. Louis street from " " "	183,589	
	Toulouse " " " " Villere.	120,502	
	Jefferson "	12,308	
	South half of St. Peter street	45,450	
	Carondelet walk from Basin to Claiborne	97,955	
	Cypress street " Liberty" "	95,490	
	Perrilat " " " " "	52,560	
	Square feet carried over	4,700,684	
	Amount bro't over	4,700,684	
	Willow or St. Adeline street Florida to Claiborne, crossed streets not included	47,736	
	Clara or Magnolia street	88,872	
	Magnolia street	117,799	
	Locust "	106,526	
	Freret "	69,028	
	Howard "	90,590	
	Liberty "	111,872	
	Franklin "	225,259	
	Basin "	463,730	
	Rampart or Circus street	411,289	
	Dryades street	121,410	
	Penn "	12,852	
	Baronne "	169,179	
	Carroll "	13,020	
	Carondelet street	158,697	
	St. Charles "	157,312	
	St. Mary and St. Francis street	32,718	
	Camp street	144,270	
	Bank place	8,175	
	Magazine street	129,465	
	Foucher "	24,570	
	Tchoupitoulas street Julia to Canal	118,080	
	Commerce street	50,310	
	New Levee	123,816	

Remarks.	Name of streets.	Area.	Amount.
Streets from the river to Claiborne street. Crossing streets are not included.	39 Fulton street	111,104	
	Front "	106,702	
	Delta "	103,354	
	Crossman street	17,940	
	Robertson " crossing not included	121,264	
	Villere " " " "	118,402	
	Marais " " " "	118,405	
	Treme " " " "	116,812	
	Burgundy " " " "	72,722	
	Dauphine " " " "	73,074	
	Bourbon " " " "	73,112	
	Royal " " " "	73,150	
	Exchange alley " " "	30,700	
	Chartres street " " "	73,264	
	Dorcier " " " "	12,480	
	Old Levee " " " "	96,390	
	Clinton " " " "	9,580	
	Peters " " " "	74,860	
	Batture of Levee bet. Canal and St. Peter	420,800	
	Superficial feet	9,521,574	$3,142.11 19/100

Remarks.	Streets north of Metairie road to the lake.	Area.	Amount.
The streets running from Metairie road to the lake are calculated the whole length. The streets running crosswise are calculated the whole length less the intersection of other streets.	Catina street	652,166	
	Harney "	302,450	
	Milne "	977,874	
	Custom-house street	814,200	
	Louisville "	814,920	
	Bienville street (Canal not included)	1,613,322	
	Vicksburg street	816,420	
	Conti "	817,082	
	Memphis "	817,563	
	St. Louis avenue	1,662,984	
	Toulouse street	709,562	
	Anthony "	710,342	
	St. Peter "	711,181	
	Orleans avenue (Canal not included)	2,581,129	
	St. Ann street	709,201	
	Murat "	709,924	
	Dumain avenue	1,421,284	
	Napoleon street	711,302	
	St. Philip "	711,966	
	Solomon "	712,622	
	Ursulines avenue (Canal not included)	1,626,882	
	Hospital street	823,261	
	Barracks street	823,922	
	Esplanade "	746,403	
	Fort "	302,880	
	First "	52,232	
	Second street	41,557	
	Third "	39,012	
	Fourth "	36,726	
	Fifth "	34,136	
	Sixth "	32,648	
	Seventh "	30,111	
	Eighth "	26,769	
	Ninth "	18,332	
	Tenth "	18,057	
	Eleventh "	15,089	
	Twelfth "	12,121	
	Thirteenth "	9,153	
	Fourteenth "	6,185	
	Fifteenth "	3,217	

The streets running from the Metairie road to the lake are calculated the whole length. The streets running crosswise are calculated the whole length less the intersections of other streets.

Remarks.	Streets north Metairie road to lake.	Area.	Amount.
	40 *Cross-streets.*		
	Fisk street	106,431	
	Genois "	145,348	
	Passage "	23,320	
	Mexico "	92,960	
	May "	328,052	
	Cass "	218,522	
	Houston "	393,980	
	Adams avenue	793,592	
	Delophon street	402,843	
	Brown "	400,080	
	Butler "	405,900	
		27,067,215	
	Am't bro't forward	27,067,215	
	North street	407,823	
	Fillmore avenue (Canal not included)	578,820	
	Conrad street	401,160	
	Walker "	397,920	
	Mouton "	403,380	
	Downs "	401,520	
	Jackson avenue	783,488	
	Ridgely street	409,680	
	Twiggs "	413,402	
	Smith "	411,420	
	Lane "	407,022	
	Harrison avenue (Canal not included)	1,429,814	
	Bragg street	413,220	
	Fremont "	415,800	
	French "	418,500	
	Ringold "	423,420	
	Polk avenue	855,120	
	Gaines street	431,102	
	Harney "	422,220	
	Brooks "	419,700	
	Scotts "	419,352	
	Taylor avenue (Canal not included)	581,190	
	Mason street	410,460	
	Crittenden street	402,012	
	Corwin "	401,520	
		39,526,280	
	Am't bro't forward	39,526,280	
	Clement street	394,746	
	Monroe avenue	888,520	
	Webster street	180,120	
	Dickinson "	172,260	
	Clay "	169,920	
	Calhoun "	164,700	
	North half of Metairie road (new)	325,850	
	Sassafras street	40,152	
	Plane "	39,348	
	Plaquemine "	38,508	
	Live Oak "	37,702	
	Ash "	36,902	
	Poplar "	36,104	
	Laurel "	35,250	
	Hickory "	34,454	
	Dublin avenue	85,760	
	Chestnut street	32,650	
	Lilac "	31,850	

The streets running from the Metairie road to the lake are calculated the whole length. The streets running crosswise are calculated the whole length, less the intersection of other streets.

Remark.	Streets north of Metairie road to the ~~lake.~~	Area.	Amount.
41	Magnolia street	31,008	
	Cypress "	30,202	
	Cotton street	29,409	
	Pine "	28,601	
	London avenue	120,312	
	Cherry street	29,102	
	Walnut "	28,256	
	Raspberry "	27,450	
		42,591,416	
	Am't bro't over	42,591,416	
	Esplanade avenue	60,170	
	Mulberry street	19,251	
	Plum "	25,803	
	Cedar "	25,002	
	Paris avenue	61,823	
	Cock Pit street	23,301	
	Robin "	22,703	
	Dove "	22,153	
	Swan "	21,802	
	Wood Cock avenue	28,803	
	Pigeon street	17,300	
	Lark "	21,052	
	Goose "	20,500	
	Duck "	19,902	
	Rail "	19,253	
	Snipe "	18,652	
	Plover "	16,604	
	Turkey avenue	15,606	
	Quail street	3,300	
	Cross "	18,497	
	Comfort street	35,086	
	Bridge "	34,821	
	Virginia "	30,528	
	Helena "	22,525	
	Canal "	165,240	
		43,361,093	
	Am't bro't forward	43,361,093	
	Gasquet street	3,975	
	North half of old Metairie road	58,781	
		43,423,849	
	Sqr. feet, am't bro't forward	9,521,574	
		52,945,423	

(Signed) G. INGRAM,
Board of Commissioners, First Draining District.

I do hereby certify that the foregoing is a true and correct extract from the original assessment rolls on file in the office of the bureau of drainage in the comptroller's office of the city of New Orleans.

New Orleans, city hall, Dec. 13, 1886.

WM. T. MAYO, *Book-keeper.*

Endorsed: " O K 1." Don Gordon, d'y clerk, civil district court.

No. of bill.	Names of owners of lands.	Dist.	No. of sq.	No. of lot.	Name of street.	Superfic'l ft.	Rate.	Amount of assessm't.
99	City of New Orleans.....	2nd.	9	3	Old Levee alley.....	296	$3\frac{8}{10}$ mills.	95
652	" engine No. 7.....	"	68	18	Dauphine.....	4,105	" "	13 55
1074	"	"	123	4	Conti.....	2,775	" "	9 15
1383	" school-house.....	"	185	5	Bienville.....	8,310	" "	27 40
3337	"	1st.	1 C.	Sq.	Walter, Delta, Common and Gravier.....	23,213	" "	76 70
8	"	"	2 C.	"	" " Poydras " "	28,422	" "	93 80
4223	" Lafayette square.....	"	176	"	South, North, St. Charles and Camp	120,713	" "	398 35
4271	" school-house.....	"	180	4	St. Charles.....	15,049	" "	49 65
4342	" engine No. 5.....	"	219	31	Girod.....	2,643	" "	8 70
4	" city hall.....	"	220	2	Lafayette.....	6,232	" "	20 55
5	" "	"	"	3	"	5,218	" "	17 20
6	" "	"	"	4	St. Charles.....	10,852	" "	35 80
4385	" engine No. 13.....	"	221	14	Perdido.....	2,666	" "	8 80
9	" Louisiana Hose Co.....	"	"	r8	Carondelet.....	2,822	" "	9 30
4795	" Poydras market.....	"	260	Sq.	N. and S. Poydras, Penn and Dryades.....	13,209	" "	43 60
5030	" " "	"	271	"	" " " Rampart "	11,742	" "	38 75
5182	Sam'l J. Peters, Jr., to city of N. O., Pilie market.	"	296	"	" " " " Basin.....	8,197	" "	16 25
5581	City of New Orleans, Fisk school.	"	332	18	Franklin.....	3,216	" "	10 60
2	Fisk school.....	"	"	19	"	3,216	" "	10 60
3	"	"	"	20	"	3,216	" "	10 60
4	"	"	"	21	"	3,216	" "	10 60
5	"	"	"	22	"	3,216	" "	10 60
5740	Engine No. 14.....	"	339	11	Common.....	3,306	" "	183 05
5853	Workhouse.....	"	377	Sq.	Magnolia.....	55,467	" "	198 80
4	House of Refuge.....	"	396	Sq.	Perrilat.....	60,245	" "	9 80
6845	Madison school	"	470	6	Palmyra.....	2,975	" "	9 80
6	"	"	"	7	"	2,975	" "	9 80
7	"	"	"	8	"	2,975	" "	9 80
8	"	"	"	9	"	2,975	" "	9 80

43										
9	"	.....	"	"	10	"	.....	2,975	" "	9 80
6850	"	.....	"	"	11	"	.....	2,975	" "	9 80
								419,412		1,372 95
8639	New Orleans city, C. city park.		2nd.	658	....	Metarie road, St. Louis, Calhoun, Toulouse.		83,243	" "	274 70
8640	" " "		"	659	....	" Anthony, " "		110,750	" "	365 47
1	" " "		"	660	....	" " " St. Peter.		111,153	" "	366 80
2	" " "		"	661	....	" Orleans, " "		70,207	" "	231 68
3	" " "		"	682	....	Clay, " " "		70,207	" "	231 68
4	" " "		"	683	....	" Anthony " "		111,153	" "	366 80
5	" " "		"	684	....	" " " Toulo'se..		110,750	" "	365 47
6	" " "		"	685	....	" St. Louis, " "		83,243	" "	274 70
8664	" " "		"	703	....	" " Dickson, "		83,243	" "	274 70
						Amount over		833,949		2,752 00
						Amount brought forward.....		833,940		$2,752 00
8665	New Orleans city, C. city park.		2nd.	704	....	Clay, Toulouse, Dickinson, Anthony.....		110,750	" "	365 47
6	" " "		"	705	....	" St. Peter, " "		111,153	" "	366 80
7	" " "		"	706	....	" " " Orleans		70,207	" "	231 68
8	" " "		"	727	....	Webster, " " "		70,207	" "	231 68
9	" " "		"	728	....	" " " Anthony.....		111,153	" "	366 80
8670	" " "		"	729	....	" Toulouse, " "		110,750	" "	365 47
1	" " "		"	730	....	" " " St. Louis.....		83,243	" "	274 70
8692	" " "		"	751	...	" " Monroe.....		83,243	" "	274 70
3	" " "		"	752	....	" " " Anthony.....		110,750	" "	365 47
4	" " "		"	753	....	" " "		111,153	" "	366 80
5	" " "		"	754	....	" Orleans		70,207	" "	231 68
8941	" " "		"	662	....	Metairie road, St. Anne, Calhoun, Orleans..		102,179	" "	337 19
2	" " "		"	663	....	" " " Murat ...		100,305	" "	331 00
3	" " "		"	664	....	" Dumaine, " " ...		84,899	" "	280 16
4	" " "		"	665	....	" " " Napoleon		88,753	" "	292 88
5	" " "		"	666	....	" St. Philip, " "		88,753	" "	292 88
6	" " "		"	667	....	" " " Solomon.		88,753	" "	292 88
7	" " "		"	668	....	" Urselines, " "		88,750	" "	292 87
8958	" " "		"	675	....	Clay, Urselines, Calhoun, "		88,750	" "	292 87
9	" " "		"	676	....	" St. Philip, "		88,753	" "	292 88

No. of bill.	Names of owners of land.	Dist.	No. of sq.	No. of lot.	Name of street.	Superfic'l ft.	Rate.	Amount of assessm't.
8960	New Orleans city, C. city park.	2nd.	677	....	Clay, St. Philip, Calhoun, Napoleon	88,753	$3\frac{3}{10}$ mills.	292 88
1	" " " "	"	678	....	" Dumaine, " " "	88,753	" "	292 88
2	" " " "	"	679	....	" " " Murat.....	84,899	" "	280 16
3	" " " "	"	680	....	" St. Anne, " " "	100,305	" "	331 00
4	" " " "	"	681	....	" " " Orleans	102,179	" "	337 19
5	" " " "	"	707	....	" " Dickinson, "	102,179	" "	337 19
6	" " " "	"	708	....	" " " Murat	100,305	" "	331 00
7	" " " "	"	709	....	" Dumaine, " "	84,899	" "	280 16
8	New Orleans city, C. city park.	2nd.	710	....	" Dumaine, Dickinson, Napoleon	88,753	" "	292 88
9	" " " "	"	711	....	" St. Philip, " "	88,753	" "	292 88
8970	" " " "	"	712	....	" Solomon	88,753	" "	292 88
1	" " " "	"	713	....	" Urselines, Dickinson, Solomon.....	88,750	" "	292 87
8980	" " " "	"	720	....	Webster, " Solomon.....	88,750	" "	292 87
1	" " " "	"	721	...	" St. Philip, "	88,753	" "	292 88
2	" " " "	"	722	....	" " Napoleon.....	88,753	" "	292 88
3	" " " "	"	723	....	" Dumaine, "	88,753	" "	292 88
4	" " " "	"	724	....	" " Murat.....	84,899	" "	280 16
5	" " " "	"	725	....	" St. Anne, "	100,305	" "	331 00
6	" " " "	"	726	....	" " Orleans	102,179	" "	337 19
7	" " " "	"	755	....	" Orleans, Murero, St. Anne.....	102,179	" "	337 19
					Amount over.....	4,548,512	.....	14,914 88
					Amount brought forward.....	4,548,512	.....	14,914 88
8988	New Orleans city, C. city park.	2nd.	756	....	Webster, St. Anne, Monroe, Murat	100,305	$3\frac{3}{10}$ mills.	331 00
9	" " " "	"	757	....	" Dumaine, " "	84,899	" "	280 16
8990	" " " "	"	758	....	" " " Napoleon	88,753	" "	292 88
1	" " " "	"	759	....	" St. Philip, " "	88,753	" "	292 88
2	" " " "	"	760	....	" " " Solomon... ..	88,753	" "	292 88
3	" " " "	"	761	....	" Urselines, " "	88,750	" "	292 87

9770 A	N. O. city, streets, St. Peter and Carondelet walk to Julia and river to Claiborne street	95,215,574	5,088,725	.....	16,697 55
9770 C	N. O. city, streets, Carondelet walk to Florida landing, Metairie ridge to the lake	52,945,423	624,669,997	.....	205,041 10

Recapitulation.

City, all streets from river to Claiborne street, and Metairie road to the lake	62,466,997	.....	205,041 10
City property, schools, markets, engine-houses, etc., with river to Claiborne street	419,412	.....	1,372 95
" " the city park, 55 squares fronting Metairie road	5,088,725	.....	16,697 55
Superficial feet	67,975,134	.....	223,111 60

I do hereby certify that the foregoing is a true and correct extract from the original assessment-rolls on file in the office of the bureau of drainage in the comptroller's office of the city of New Orleans.

(Signed) WM. T. MAYO,
Book-keeper.

City hall, December 13, 1886.

46 EXHIBIT "B."

Proceedings in the matter of the Commissioners of the Second Draining District praying a decree of mortgage privilege, etc., rendered by the third judicial district court of Jefferson, in suit No. 1938 of the docket, rendered and signed April 29, 1861.

Filed with and made part of bill November 26, 1894.

(Written in red ink: Exhibit "B," from pages 1 to 5 inclusive, and the first eleven lines on page 6, with clerk's certificate on page 12.)

To the Hon. Victor Burthe, judge of the third judicial district court of Louisiana in and for the parish of Jefferson:

The petition of the Board of Commissioners of the Second Draining District, through them President L. H. Place, respectfully represents:

That agreeably to the provisions of an act entitled "An act to provide for leveeing and reclaiming swamp lands in certain portions of the parishes of Orleans and Jefferson," approved March 18, 1858, your petitioners have had three plans drawn by A. S. Phelps, engineer of said draining district of a certain section of land lying within the parish of Jefferson, described in the advertisements hereunto annexed and made part of this petition; that said plans accurately designate the limits of said section, and as much as possible, the subdivisions of the property therein contained and the names of the proprietors, and also the divisions and directions of the canals intended to be dug and the places where the steam-engine is to be established, that true copies of said plans were deposited in the office of the parish recorder of the parish of Jefferson on the 11th of January, 1861, and notices inserted in French and English in the "New Orleans Commercial Bulletin" and the "New Orleans Daily Crescent," two newspapers published in the city of New Orleans once a week, during four weeks in succession, announcing that your petitioners were about to proceed to drain said section, describing the place where said plans were and are deposited, accurately defining the limits thereof and indicating as near as possible the time within which the draining thereof will be completed, and the probable cost of said works, all of which will more fully and accurately appear by reference to the certificate of the parish recorder of the parish of Jefferson, and copies of said New Orleans newspapers containing said notices herewith filed;

The premises considered, your petitioners are entitled to and pray for a decree from this hon. court subjecting each portion of the property situated within the limits of said second draining district lying in the limits of the parish of Jefferson to a first-mortgage lien and privilege in favor of your petitioners, The Board of Commissioners

of the Second Draining District, for such amount as may be
47 assessed on it for its portion of the whole cost of drainage of said section in accordance with the provisions of the statute by which said privilege lien and mortgage are created, and interest thereon at the rate of 6 per cent. per annum from demand thereof; and they pray for such other and general relief as the nature of the case and the law may require—and they will ever pray, etc., etc.

(Signed) C. ROSELIUS.

Endorsement on the foregoing petition: "In the third judicial district court. No. 1938. Filed February 15, 1861. J. Regnaud, D. clerk."

Order on the Foregoing Petition.

Considering that the judge of the 3d judicial district court is interested — the result of this suit and must secure himself, it is ordered that this case be transferred to the 6th district court of New Orleans.

Parish of Jefferson, March 14th, 1861.

(Signed) VICTOR BURTHE, *Judge.*

Judgment.

No. 1938. In the Third Judicial District Court in and for the Parish of Jefferson.

In the Matter of the Board of Commissioners of the Second Draining District Praying, etc.

The petitioners, The Board of Commissioners of the Second Draining District, ask for a decree in accordance with an act of the legislature approved March 18th, 1858, "to provide for the leveeing, draining and reclaiming swamp lands in certain portions of the parishes of Orleans and Jefferson," subjecting each portion of the property in said district within the parish of Jefferson to a first-mortgage lien and privilege in their favor for such amount as may be assessed on it for its proportion of the whole cost of drainage.

Several parties have filed oppositions to this application based on various grounds, only two of which it is necessary here to consider, as all others will more properly arise in another proceeding. These two are *first* the constitutionality of the statute and *secondly* the observance of the formalities prescribed by said statute.

The grounds of unconstitutionality urged herein have been distinctly passed upon in the case of the New Orleans Draining Company praying, etc., reported in 11 An., 338, in which similar provisions were sustained by the supreme court and the right to make an assessment for similar purposes declared to be legal and constitutional.

As to the second ground of opposition to be considered it is admitted that the publications — according to law, but it is contended that the plans are defective in not showing correct subdivisions and the names of the proprietors.

The statute provides that a plan shall be made "accurately
48 designating the limits of the section or district to be drained, and as *far* as possible the subdivisions of the property therein contained and the names of the proprietors, etc." It is in proof that books showing the subdivisions of squares into lots, containing the names of the proprietors and readily referable to the plans, were deposited with said plans as a part thereof and to supply the deficiency in that respect in the plans. These plans and books are said to designate the limits of the section to be drained, and as far as possible the subdivisions of the property therein contained and the names of the proprietors, and they therefore meet the requirements of the law antecedent to the decree sought by petitioners.

It is therefore ordered that the oppositions herein filed be dismissed with costs and without prejudice to the rights of the parties not herein expressly passed on. And it is further ordered, adjudged and decreed that each portion of the property situated within the limits of the second draining district and lying within the parish of Jefferson, and described in the advertisements and plans deposited by the commissioners of the second draining district in the office of the parish recorder of said parish, as beginning at the Mississippi river at the boundary line between the parishes of Orleans and Jefferson, along said boundary line to Lake Pontchartrain, along the shores of said lake to the Jefferson & Pontchartrain railroad, following said road to the River Mississippi and following the banks of said river to the starting point, be and is hereby subject to a first-mortgage lien and privilege in favor of petitioners The Board of Commissioners of the Second Draining District for such amount as may be assessed upon said property for its proportion of the whole costs of draining said section in accordance with the provisions — statute creating said first-mortgage lien and privilege with interest thereon at six per cent. per annum from demand thereof.

(Signed) B. K. HOWELL,
Judge 6th District Court of New Orleans Acting in Place of Judge Burthe, Recused.

Endorsement on foregoing judgment: No. 1935. In the matter of the Board of Commissioners of the Second Draining District praying for a decree of mortgage, etc. Judgment filed April 29, 1861. E. Buisson, clerk.

"*Homologation* 2" *Exhibit from Line* 14, *on Page* 6, *to Page* 12 *Inclusive.*

To the hon. the second judicial court of Louisiana in and for the parish of Jefferson:

The petition of the Board of Commissioners of the Second Draining District respectfully represents:

That in conformity with an act of the legislature entitled "An act

to provide for the collection of the assessment for draining under
49 the acts of March 18th, 1858," and the act supplementary thereto of March 17th, 1859, approved March 1st, 1861, a tableau or assessment-roll of amount to be paid for draining the property within the said second draining district (within the limits of the parish of Jefferson) has been prepared and notice thereof been duly given; that your petitioners herewith present a copy of said assessment to be filed in this honorable court; that in said assessment-roll the property assessed is set forth together with the amount assessed and the names of the owners thereof as far as known, and in case the owner or owners are unknown said fact is stated, all of which together with other necessary particulars will more fully appear by reference to said copy of the assessment-roll herewith exhibited and filed, and contained in books numbered respectively 1, 2 and 3.

Your petitioners therefore respectfully pray that in pursuance of said act of the legislature it may please the court to order, that all persons whom it may concern, do show cause within thirty days from the first publication of said order, if any they have why said assessment-roll should not be approved and homologated; that said order be published in the English and French languages in the Carrollton *Times* newspaper, twice a week for thirty days, and that after due proceedings had judgment be rendered approving and homologating said assessment-roll, to operate as a judgment against the property assessed, and the owner or owners thereof for the amount of assessment with ten per centum in addition — the amount assessed to pay cost and counsel fees, the whole according to the acts of the legislature aforesaid found at pages 43 and 44 of the printed Sessions of Acts of 1861; and your petitioners pray for general relief—and as in duty bound, etc., etc.

(Signed) C. ROSELIUS AND
ALFRED PHILIPS.

Order on the Foregoing Petition.

"Order."

Upon filing the assessment-roll of the second draining district within the parish of Jefferson, and on the petition of the board of commissioners of said district it is ordered that all persons whom it may concern do show cause if any they have within thirty days from the first publication of this order, why said assessment-roll should not be approved and homologated; and it is further ordered that said order be published in the English and French languages in the Carrollton *Times* newspaper twice each week for thirty days.

Dec. 7, 1868.

(Signed) DON A. PARDEE,
Judge 2nd Jud'l Dist. Court, La.

Endorsement on the foregoing petition: "No. 1938. Second judicial district court of Louisiana, parish of Jefferson. In the
50 matter of the board of commissioners of the second draining district for the homologation of tableau of assessment, etc., etc.

Petition and assessment-rolls in Books Nos. 1, 2 and 3, etc. C. Roselius and Alfred Philips, of counsel. Filed Dec. 11, 1868. H.C. Caulkins, d'y clerk."

Judgment.

Second Jud. Dist. Court, Parish of Jefferson. No. 1938.

In the Matter of the Commissioners of the Second Draining District Praying for Homologation of Tableau, etc.

On motion of C. Roselius and Alfred Philips of counsel for the petitioners herein and on producing to the court due proof of the publication of notices to all persons interested to show cause if any they have, why said assessment-rolls or tableau filed by the said board of commissioners should not be approved and homologated, all made according to law. It is now ordered, adjudged and decreed that said report be approved and homologated so far as not opposed and the same to operate as a judgment against the property assessed and the owner or owners thereof with ten per cent. in addition to the amount for costs of counsel fees and costs according to the act of the legislature, etc.

Judg't rendered March 15th, 1869, and signed March 23, 1869.

(Signed) DON A. PARDEE, *Judge.*

Endorsement on foregoing judgment: No. 1938. Second judicial dist. court, parish of Jefferson. In the matter of the board of commissioners of the second drainage dist. praying for homologation of tableau, etc. Motion to homologate tableau, so far as not opposed, with proof of publication, etc., etc. C. Roselius & Alfred Phillip, of counsel. Filed March 15, 1869. H. A. Burns, d'y cl'k.

51 Extract from the assessment-rolls of the second drainage district, parish of Jefferson. Filed in the third judicial district court, parish of Jefferson, on the 11th day of December, 1868, and referred to in the foregoing petition praying for the homologation of said assessment-rolls and in the judgment homologating the same, rendered on the 15th and signed March 23, 1869, in suit No. 1938 on the docket of said court.

Name of owner.	Name of street.	No. of lot.	Measurement.	Sup'rficial feet.	Percentage.	Assessment.
City of Jefferson, Pleasance	Magazine	19, 20	64 x 127-4	8,148	2 mills per sq. ft.	16 30
City of Jefferson, East Bouligney	Marengo	20, 21	58 x 120	6,960	"	13 92
Pioneer Fire Co. No. 1, East Bouligney	Berlin	22	30-2 x 120	3,620	"	7 24
City of Jefferson, East Bouligney		1 to 10	300-4 x 150	45,050	"	90 10
City of Jefferson, West Bouligney	Jersey	15, 16, 17, 18	120 x 100	12,000	"	24 00
City of Jefferson, West Bouligney	1 sq.		305 x 300	91,500	"	183 00
City of Jefferson, Anest	½ sq.		150 x 153-4	23,000	"	46 00
City of Carrollton, parish court-house and jail	1 sq.	20 lots	275 x 275	75,625	"	151 25
Carrollton Fire Co. No. 1	Dublin		34 x 120	4,080	"	8 16
City of Carrollton	Dublin	6	30 x 120	3,600	"	7 20
City of Carrollton	Third	11	41 x 150	6,150	"	12 30
City of Carrollton	Jefferson	6, 7, 8	90 x 120	10,800	"	21 60
City of Carrollton	Small strip on Fourth St.		8-6 x 96-9	824-6	"	1 65
Town of Carrollton	Washington	7, 10	120 x 120	14,400	"	28 28
City of Carrollton	Whole sq.		275 x 650	178,750	"	357 50
City of Carrollton, Green square			300 x 300	90,000	"	180 00
City of Carrollton, Frederick square	1 sq.		300 x 300	90,000	"	180 00
City of Carrollton, Hamilton square	Public sq.		325 x 650	211,250	"	422 50
Town of Carrollton, all the public streets in the town of Carrollton				20,068,500	"	40,137 00
City of Jefferson, all the public streets in the city of Jefferson				26,931,000	"	53,862 00
All the public streets in Hurtsville, police jury parish of Jefferson				3,299,560	"	6,599 12
All the public streets in Bloomingdale, police jury of the parish of Jefferson				1,477,970	"	2,955 94
All the public streets in Burthville, police jury of the parish of Jefferson				3,381,960	"	6,768 92

51

Name of owner.	Name of street.	No. of lot.	Measurement.	Sup'rficial feet.	Percentage.	Assessment.
All the public streets running across the land of S. F. Foucher, police jury of the parish of Jefferson				413,500	2 mills per sq. ft.	827 00
All the public streets in Greenville, police jury of the parish of Jefferson				2,353,750	"	4,707 50
All the public streets in Fribourg, police jury of the parish of Jefferson				1,898,775	"	3,797 55
All the public streets in Marly, police jury of the parish of Jefferson				1,008,500	"	2,017 00
Market square, police jury parish of Jefferson	1 sq		90 x 300	27,000	"	54 00
Metairie road, police jury parish of Jefferson			3,412 x 40	136,480	"	272 96

A true copy.
December 10, 1886.
[SEAL.]

JAS. C. BAUMANN,
Clerk and ex Officio Recorder, Parish of Jefferson.

53 I, James C. Baumann, clerk of the twenty-sixth judicial district court in and for the parish of Jefferson and custodian of the records of the late second and third judicial district court for the parish of Jefferson, do hereby certify that the foregoing pages 1, 2, 3, 4, 5, 6, 7, 8 and 9, contain true and correct copies of the original papers on file in my office; that no answers or oppositions, were filed in said proceedings by the city of New Orleans, the city of Carrollton, Jefferson city, or the police jury of the parish of Jefferson, as appears by the docket of said court; that the judgments therein rendered are final and executory and that the foregoing page number eleven contains a true and correct extract from the copy of assessment-rolls on file in my office in the above suit and referred to in the foregoing judgment of the court homologating said assessment-rolls.

[SEAL.] (Signed) JAMES C. BAUMANN,
Clerk 26th Judicial District Court, Parish of Jefferson.

Gretna, parish of Jefferson, December 10th, A. D. 1886.

Endorsed: 2nd judicial dist. court. In the matter of the Board of Draining Commissioners praying for homologation of assessment-rolls, etc. Copies of petition, judg'ts, and extracts from ass.-rolls. (Written in red ink:) $128,454.29 with interest and 10 per cent. counsel fees and costs. Exhibit- "B" and "B 1."

Certificate of Mortgage Referred to in the Foregoing Petition. Filed February 15, 1861, *and Referred — in Pages* 1 *and* 2 *Foregoing.*

STATE OF LOUISIANA, }
Parish of Jefferson. }

I, Ernest Commagers, parish recorder for the parish of Jefferson, hereby certify that on this day, L. H. Place, Esq., president of the commissioners of the second draining district, has deposited in this office three plans certified as true copies of originals on file within the office of said commissioners by A. S. Phelps, engineer of said draining district dated January 9th, 1861, said plans comprising all the portion of said draining district lying in the parish of Jefferson.

I also certify that said president has made a special deposit in this office of three books of assessments comprising the subdivisions of the property included in said plans. The said three books of assessments not to be recorded, but simply deposited for examination by parties interested.

In faith whereof I have hereunto set my hand and seal at the court-house, Carrollton, this eleventh day of January, eighteen hundred and sixty-one.

[SEAL.] (Signed) ERNEST COMMAGERE, *Recorder.*

Endorsed: 1938. Certificate of deposit of plans, etc., in the parish of Jefferson, January 11, 1861. Filed February 15th, 1861. J. Regaud, d'y cl'k.

54 Second Judicial District, Parish of Jefferson. No. 1938.

In the Matter of the Commissioners of the Second Draining District Praying for Homologation of Tableau.

To the honorable the judge of the second judicial district court, parish of Jefferson:

The petition of the city of New Orleans, a municipal corporation chartered and duly organized under the laws of the State of Louisiana, located in the parish of Orleans, State aforesaid, and of the board of administrators of the said city, respectfully represents:

That heretofore, to wit, on or about the 15th day of March, 1869, in the above entitled and numbered proceedings, a final judgment was duly rendered by this honorable court, and upon the 23d day of the same month was regularly signed, homologating and approving a certain tableau of assessments for draining purposes made under and *in* conformably to certain acts of the General Assembly of the State of Louisiana in that case made and provided.

That for greater certainty, your petitioners hereunto annex a copy of the aforesaid judgment, and make the same a*t* part hereof and respectfully refer your honor to the tableau of assessments underlying such judgment.

That in the opinion of your petitioner- it is unnecessary to take proceedings for the revival of the judgment had and obtained as aforesaid, but to prevent the rights of all parties interested therein from being clouded over, and out of an abundance of caution your petitioners, without waiving or abandoning any privil-ge or right conferred by the aforesaid judgments desire to supplement the same by an order or decree of revival.

Wherefore, your petitioners pray that the several parties named and designated in the aforesaid tableau of assessments, and the owner or owners of all the property referred to therein whether such owners be known or unknown by an order of this honorable court to be made and granted herein, may be required to show cause, within thirty days from the first publication of such order, if any they have, why the judgments aforesaid should not be regarded as being revived, and possessing *its* original force and effect.

That an attorney *ad hoc* may be appointed by this honorable court to represent any and all of such defendants in the aforesaid judgment, as may be absent and not represented; that the said attorney may be cited to appear and answer this petition; that this cause may otherwise be proceeded *in* according to law; that after due proceedings had, the judgment aforesaid may be decreed to be revived and to have its original force and effect; and that petitioners may have such other and further order, judgment and decree as may be suited to law and the nature of this case.

(Signed) SAM'L P. BLANC,
Assistant City Attorney.

55 *Copy of Judgment Annexed to the Foregoing Petition.*

(Copy.)

2d Jud'l Dist. Court, Parish of Orleans. No. 1938.

In the Matter of the Commissioners of the Second Draining District Praying for Hom'n of Tableau, etc.

On motion of C. Roselius and Alfred Philips of counsel for the petitioners herein and on producing to the court due proof of the publication of notices to all persons interested to show cause, if any they have, why said assessment-rolls or tableau filed by the said board of commissioners should not be approved and homologated all made according to law.

It is now ordered, adjudged and decreed that said report be approved and homologated as far as not opposed and the same to operate as a judgment against the property assessed and the owner or owners thereof with ten per cent. in addition to the amount assessed for costs of counsel fees and costs according to the act of the legislature etc.

Judgment rendered March 15th, 1869, and signed March 23rd, 1869.

(Signed) DON A. PARDEE, *Judge.*

Order Granted on the Foregoing Petition.

Second Judicial District, Parish of Jefferson. No. 1938.

In the Matter of the Commissioners of the Second Draining District Praying for Homologation of Tableau.

Upon reading the foregoing petition, it is hereby ordered that the several parties named and designated in the tableau of assessments referred to in and homologated by a judgment of this court rendered upon the 15th day of March, 1869, in the above entitled and numbered proceeding, and signed on the 23d day of the same month do show cause within thirty days after the first publication of this order, if any they have why the said judgment shall not be revived and held to possess its original force and effect.

It is further ordered that Clark W. Beasancon, Esq., be and he is hereby appointed curator *ad hoc* to represent herein all such of the defendants in the original judgment as are "absent and not represented" and that the said curator *ad hoc* be cited and served with a copy of the petition for revival, herein filed.

(Signed) DON A. PARDEE,
Judge 2d Judicial District, La.

All endorsed: No. 1938. Second judicial district, parish of Jefferson. In the matter of the Commissioners of the Second Draining District praying for homologation of tableau, etc. Petition and order for revival of judgment. Sam. P. Blanc, assistant city attorney. Filed Jan. 29, 1879. E. A. Flanheau, clerk.

56 Second Judicial District, Parish of Jefferson. No. 1938.

In the Matter of the Commissioners of the Second Drainage District Praying for Homologation of Tableau.

And now before the court comes the City of New Orleans by Samuel P. Blanc, assistant city attorney and intervenor Ed. C. Palmer by Lacy & Butler his counsel, and shows the same:

1. That the order to show cause why the judgment heretofore rendered herein should not be revived, and held to have its original force and effect, has been duly published in the Jefferson *Sentinel* and by posting at three public places in the parish of Jefferson:

2. That the delay required by law has expired without certain parties in interest therein having made any opposition to the aforesaid order, or rule, being made absolute; and,

3. That this appearer is desirous to have the judgment revived as against all parties, who have not made opposition thereto or otherwise appeared herein.

Wherefore, this appearer moves the court, that the rule or order, herein taken bearing date January 24, 1879, be made absolute so far as not opposed; and that as against any and all parties, who have failed to appear herein, or to file an opposition thereto that the judgment of this honorable court, homologating and approving a certain tableau of assessments in the second drainage district, rendered in the above entitled and numbered proceedings, on the 15th day of March, A. D. 1869, and signed on the 23d day of that month, be ordered, adjudged and decreed to be revived, and to have its original force and effect, with such other relief as the court may see proper to grant.

(Signed) SAM. P. BLANC,
Assistant City Attorney.

(Signed) LACY & BUTLER, *Attorneys.*

Judgment.

Second Judicial District, Parish of Jefferson. No. 1938.

In the Matter of the Commissioners of Second Drainage District Praying for Homologation of Tableau.

On motion of Samuel P. Blanc, assistant city attorney for the city of New Orleans, and Lacy & Butler of counsel for intervenor, Ed. C. Palmer, and upon due proof of publication, in accordance with law, and the law and evidence authorizing the same:

It is hereby ordered, adjudged and decreed as against all parties who have failed to put in an appearance in this proceeding, and so far as the application for a revival has not been opposed, that the order herein granted bearing date Jan'y 24, 1879, be and the same is hereby made absolute, and that the judgment herein sought to be revived, rendered by the court on the 15th day of March, A. D.

1869, and signed on the 23d of that month, approving and
57 homologating a certain tableau of assessments, be and the same is hereby revived, and it is adjudged and decreed to have all of its original force and effect.

Judgment rendered April 9th, 1879.

Judgment signed April 18th, 1879.

(Signed) DON A. PARDEE, *Judge.*

Endorsed: No. 1938. Second judicial district, parish of Jefferson. In the matter of the Commissioners of the Second Drainage District praying for homologation of tableau. Motion for judgment of revival so far as not opposed—above Toledano. Sam. P. Blanc, ass't city att'y. Filed April 9, '79. L. Soubles, d'y cl'k.

STATE OF LOUISIANA,
Parish of Jefferson, Clerk's Office, } *ss:*
26 *Judicial District Court,*

I, John C. Tellotson, clerk of the twenty-sixth judicial district court in and for the parish of Jefferson and custodian of the records of the late third and second judicial district courts for the parish of Jefferson, do hereby further certify that the foregoing 14th, 15th, 16th, 17th, 18th, 19th, 20th, 21st and 22d pages are true and correct copies of the original papers on file and of record in said clerk's office of said 26th judicial district for the parish of Jefferson, that no opposition or answer was filed to any of said proceedings set forth in said pages 14 to 22 inclusive, by the city of New Orleans, the city of Carrollton, Jefferson city or the police jury of the parish of Jefferson, and that no appeal has been taken from said proceedings, set forth in said pages from 14 to 22.

Parish of Jefferson, December 24, 1886.

(Signed) J. C. TELLOTSON,
Deputy Clerk 26th Judicial Dist. Court. [SEAL.]

Endorsed: No. 1938. 2nd judicial dist. court. In the matter of the Board of Draining Commissioners praying for homologation of *assessment-rolls*, etc. Copies of petition, judgments, extracts from assessment-rolls and proceeding for revival of judgment, etc. (in red ink), $128,454.29, Exhibit B, and "homologation 2."

58 EXHIBIT "C."

Proceedings in the matter of the Board of Commissioners of the Second Draining District praying, etc., decree of mortgage privilege rendered by third district court of New Orleans, in suit No. 15846 on docket of said court, rendered and signed on 9th day of February, 1861.

Filed with and made part of bill Nov. 26, 1894.

(Written in red ink:)
Exhibit C from pages 1 to 3 inclusive,
& the first 14 lines of page 4, with
Clerk's certificate on page 11.
(Stamps.)

No. 15846, third district court, parish of Orleans, transferred to No. 9188, seventh district court, parish of Orleans; transferred from that court to 39094, fourth district court, parish of Orleans; transferred from that court to No. 26643, third district court, parish of Orleans, superior district court, parish of Orleans; transferred from that court to No. 25393 and transferred from that court *transferred* to No. 18995, civil district court, parish of Orleans. Filed October 20, 1886.

To the Hon. *Hon.* Louis Duvignaud, judge of the third district court of New Orleans:

The petition of the Board of Commissioners of the Second Draining District through its president, L. H. Place, respectfully represents:

That agreeably to the provisions of an act entitled "An act to provide for leveeing, draining and reclaiming swamp lands in certain portions of the parishes of Orleans and Jefferson," approved March 18, 1858, your petitioners have had two plans drawn by A. S. Phelps, engineer of said draining district of a certain section of land within the parish of Orleans, described in the advertisements annexed to and made part of this petition; that said plans accurately designate the limits of said section, and as much as possible the subdivision of property therein contained and the names of the proprietors and also the divisions and directions of the canals intended to be dug and the places where the steam-engines are to be established; that true copies of said plans were deposited in the office of the recorder of mortgages of the parish of Orleans on the 11th January, 1861, and notices inserted in French and English in the New Orleans *Commercial Bulletin* and the New Orleans *Daily Crescent*, two newspapers published in the city of New Orleans once a week during four weeks in succession, announcing that your petitioners were about to proceed to drain said section, describing the place where said plans are deposited, accurately defining the limits thereof and

indicating as near as possible, the time within which the
59 draining thereof will be completed and the probable cost of said work, all of which will more fully and accurately appear by reference to the certificate of the recorder of mortgages of the parish of Orleans, and copies of said New Orleans newspapers containing said notices herewith filed;

The premises considered, your petitioners are entitled to and pray for a decree from this honorable court subjecting each portion of the property situated within the limits of said second draining district lying within the parish of Orleans, to a first-mortgage privilege and lien in favor of your petitioners, The Board of Commissioners of the Second Draining District, for such amount as may be assessed on it for its proportion of the whole cost of drainage of said section in accordance with the provisions of the statute by which said privilege and mortgage and lien are created, and interest thereon at the rate of 6 per cent. per annum from demand thereof, and they pray for all such other and general relief as the nature of the case and the law may require, and they will ever pray, etc.

(Signed) C. ROSELIUS.

OFFICE RECORDER OF MORTGAGES,
PARISH OF ORLEANS, LA.

I, John Holmes, recorder of mortgages, hereby certify that on the 11th day of January, 1861, L. H. Place, Esq., president of the second draining district, has deposited in this office two plans certified as true copies of original on file in the office of said commissioners by A. L. Phelps, engineer of said draining district, and dated 9 January, 1861, said plans comprising all the portion of said draining district lying in this parish, and also has deposited in this office four books of assessments, comprising the subdivisions of the property included in said plans and the amounts required to be paid by the owners of said subdivisions in order to defray the estimated cost of drainage.

In faith whereof, I have hereunto set my hand and seal at the mortgage office aforesaid.

[SEAL.] (Signed) COLOMB DAVIS, *D'y Rec.*

Endorsed: Certificate of deposit of plans, etc., in the parish of Orleans, Jan. 11th, 1861. 15846. Filed Feb. 9th, 1861. I. Gonelles, d'y clerk.

Judgment on Foregoing Petition.

Decree.—Proof having been made of the publications and deposit of plans in the mortgage office of the parish of Orleans by the commissioners of the second draining district, agreeably to the provisions of the law, it is decreed that each portion of the property situated within the limits of the second draining district and lying within the parish of Orleans as described in said advertisements as beginning at the Mississippi river at the upper side of Julia street,

along Julia street to Mobile landing, along said landing to
60 Delord street, along Delord street and the upper side of the canal of the New Orleans Canal and Banking Company, following said canal to Lake Pontchartrain, along the shores of said lake to the line between the parish of Orleans and Jefferson, following said parish line to the River Mississippi and following the banks of said river to the starting point, be, and is hereby, subjected to a first-mortgage lien and privilege in favor of said Board of Commissioners of the Second Draining District, for such an amount as may be assessed on it for its portion of the whole costs of drainage of said portion in accordance with the provisions of the statute by which said mortgage lien and privilege are created, with interest thereon at the rate of 6 per cent. per annum from demand thereof.

(Signed) LS. DUVIGNAUD, *Judge.*

New Orleans, February 9th, 1861.

Endorsed on foregoing petition: "In the third district court of N. O. No. 15846. In the matter of the Board of Commissioners of the Second Draining District praying for a decree of mortgage privilege, etc., etc., etc. Filed February 9th, 1861. (Signed) D. Jonelle, d'y clerk."

(Written in red ink:) Exhibit "Homologation 3" "C 1" from line 14 page 4 to page 11 inclusive.

A true copy.
DON GORDON, *D'y Clerk.*

No. 15846, third district court, parish of Orleans, transferred to No. 9188, 7th district court, parish of Orleans; transferred to No. 25393, 3d dist. court, parish of Orleans; transferred to No. 18995, civil dist. court, parish of Orleans. Filed Oct. 2, 1886.

To the Hon. C. M. Emerson, judge of the third district court of New Orleans:

The petition of the Board of Commissioners of the Second Draining District respectfully represents: That, in conformity with the act of the legislature, entitled "An act to provide for the collection of the assessment for draining, under the acts of March 18, 1858, and the act supplementary thereto, of March 17, 1859," a tableau or assessment-roll of the amount to be paid for draining the property within the said second draining district (within the parish of Orleans) has been prepared, and notice thereof has been duly given; that your petitioners herewith present a copy of said assessment, to be filed in this honorable court; that in said assessment-roll the property assessed is set forth, together with the amount assessed and the names of the owners thereof, as far as known, and in case the owner or owners are unknown, said fact is stated; all of which, together with other necessary particulars, will more fully appear by reference to said copy of the assessment-roll, herewith exhibited and filed and contained in bound volumes numbered 1, 2, 3 and 4.

61 Your petitioners, therefore, respectfully pray that, in pursuance of said act of the legislature, it may please the court to order that all persons whom it may concern do show cause within thirty days from the first publication of said order, if any they have, why said assessment-roll should not be approved and homologated; that said order be published in the English and French languages in the New Orleans *Bee* newspaper twice each week for thirty days, and that after due proceedings had, judgment be rendered approving and homologating said assessment-roll, to operate as a judgment against the property assessed and the owner or owners thereof, for the amount of assessment, with 10 per cent. in addition to the amount assessed to pay costs and counsel fees the whole according to the act of the legislature aforesaid found at pages 43 and 44 of the printed Session Acts of 1861; and your petitioners pray for general relief, and as in duty bound, etc., etc.

(Signed) C. ROSELIUS AND ALFRED PHILIPS.

Endorsed: "In the third district court. No. 15846. In the matter of the Board of Commissioners of the Second Draining District praying for homologation of assessment-roll, etc., etc. Petition and assessment-roll 1, 2, 3, and 4. C. Roselius and Alfred Philips of counsel. Filed June 16th, 1868. J. O. Chalon, d'y cl'k."

Order on Foregoing Petition.

Upon filing the assessment-roll of the second draining district within the parish of Orleans and on the petition of the Board of Commissioners of said Draining District, it is ordered that all persons whom it may concern do show cause if any they have within thirty days from the first publication of this order why said assessment-roll should not be approved and homologated, and it is further ordered that said order be published in the English and French languages in the New Orleans *Bee* newspaper twice each week for thirty days.

New Orleans, June 16, 1868.

(Signed) CHAS. M. EMERSON, *Judge.*

A true copy.

DON GORDON, *D'y Clerk.*

62 No. 15846, 3d dist. court, parish Orleans, transferred to No. 9188, 7th district court, parish of Orleans; transferred to No. 25393, 3d district court, parish of Orleans; transferred to No. 18995, civil district court, parish of Orleans. Filed Oct. 20, 1886.

Third District Court. No. 15846.

In the Matter of the Board of Commissioners of the Second Draining District Praying for the Homologation of Assessment-roll, etc., etc.

On motion of C. Roselius and Alfred Philips of counsel for the Board of Commissioners of the Second Draining District and on producing to the court due proof of the publication of notices in the English and French languages during thirty days, in the New Orleans *Bee* a daily newspaper published in the city of New Orleans, to all persons interested, to show cause, if any they have, why said assessment-roll filed by said board of commissioners should not be approved and homologated and made according to law, and on further producing proof that no opposition has been filed to the homologation and approval of the same;

It is ordered, adjudged and decreed that said report and assessment-roll be approved and homologated; and to operate as a judgment against the property therein assessed and against the owner or owners thereof with ten per centum in addition to the amount assessed for counsel fees and costs, all according to the act of the legislature No. 57 approved March 1st, 1861.

Judgment rendered November 11th, 1868.

Signed November 16th, 1868.

(Signed) CHAS. M. EMERSON, *Judge.*

A true copy.

DON GORDON, *D'y Clerk.*

I certify that no opposition has been filed to the homologation of the assessment-rolls herein.

New Orleans, Nov. 11, 1868.

J. O. CHALON, *D'y Clerk.*

Endorsed: "15846. Third district court. In the matter of the Board of Commissioners of the Second Draining District praying for homologation of assessment-roll, etc., etc. Motion made to homologate, etc., etc., with proof of publication according to law, etc., etc. C. Roselius and Alfred Phillips, of counsel."

A true copy.

DON GORDON, *D'y Clerk.*

63 Extract from the copy of assessment-rolls of the second draining district, parish of Orleans. Filed in the third district court, parish of Orleans, on the 16th day of June, 1868, and referred to in the foregoing petition praying for the homologation of said assessment-rolls and in the foregoing judgment homologating said assessment-rolls and rendered on the 11th and signed on the 16th November, 1868.

Name of owner of land.	Name of street.	Nos. of lots.	Measurement.	Superficial feet.	Percentage.	Assessment.
Square 118. Annunciation, Erato, Gaiennie and Constance.						
City of New Orleans	Gaiennie		131 84	11.296	2 mills per sq. ft.	22 59
Square 214. Clio, St. Charles, Calliope and Carondelet.						
City of New Orleans, engine-house	Calliope		23^{6} 123	2.870		5 74
Square 279. Thalia, Dryades, Erato and Rampart.						
City of New Orleans	Dryades		96 127^{10}	12.250		24 51
Do.	" and Erato		64 "	8182		16 36
Square 55. Commerce, Tchoupitoulas, Julia and St. Joseph.						
City of New Orleans	St. Joseph		26^{6} 89^{9}	2424		4 85
Square 253. Erato, Clio, Baronne and Dryades.						
State normal school	Erato		108 159^{9}	17260		34 52
Square No. 40. Tchoupitoulas, Race, Peters and Orange.						
City of New Orleans, engine-house	Tchoupitoulas	5	26^{1} 122	3392		6 78
Square 45. Tchoupitoulas, Thalia, Peter and Hunter.						
City of New Orleans, engine-house	Hunter		25 96	2400		4 80
Square 94. Orange, St. Thomas, Richard and Chippewa.						
City of New Orleans, school	Chippewa		80 128	10240		20 48
Square 103. Annunciation, Terpsicore, Chippewa and Robin.						
City of New Orleans (police)	Chippewa	2 1	64 55^{6}	35.52		7 10
Square 152. Terpsichore, Magazine, Robin and Camp.						
City of New Orleans, school	Magazine		160 128	20480		40 96
Square 250.						
City of New Orleans	Dryades market		256 128	32.768		65 54
Square 251. Thalia, Baronne, Melpomene and Dryades.						
City of New Orleans, engine-house	Thalia		32 128	4096		8 19
Square 305. St. Patrick, St. David, Washington and Sixth.						
New cemetery, city of New Orleans	Square		448 300	134.400		268 80

Name of owner of land.	Name of street.	Nos. of lots.	Measurement.	Superficial feet.	Percentage.	Assessment.
Square 318. Franklin, Liberty, Philip and Race.						
City of New Orleans	Fraction			14.40		2 88
Square 314. Howard, Freret, Sixth, Washington.						
City of New Orleans	Public square		258 352	90.816		181 63
Square 342. Howard, Freret, Fourth and Third.						
City of New Orleans	Public square	1 a 22	254 352	89.408		178 82
Square 28. Levee, Rosseau, Sorapuru and Philip.						
Engine-house	Levee	21	32 103	3.296		6 59
Square 38. Religious, Rousseau, St. Mary and Felicity.						
Engine-house		3	27^{6} 127^{10}	3.518		7 04
Square 44. Rousseau, St. Thomas, Jackson and Philip.						
Recorder's office, city of New Orleans	Rousseau	93	64 158^{9}	1016		20 32
Hook and ladder Co., city of New Orleans	Jackson	4	30 115	3.448		6 90
Square 78. Chippewa, Annunciation, 2d and 3d.						
City of New Orleans	Clay square		252 320	80640		161 28
Square 100. Annunciation, Laurel, Philip and Jackson.						
City of New Orleans, school	Philip	13 17	162 120	19 200		39 40
Square 118. Laurel, Constance, Eighth and Ninth.						
City of New Orleans, school	Ninth	18, 19, 20	96 126	120.96		24 20
Square 124. Constance, Magazine, Harmony and Ninth.						
City of New Orleans, market	Magazine	1	38 100	3800		7 60
City of New Orleans, school	Constance	4 5	68 100	6800		13 60
Squares 141, 142. Magazine, Camp and St. Mary.						
City of New Orleans, market	Square			21890		43 78
Square 151. Magazine, Camp, Fourth, Washington.						
City of New Orleans, engine-house	Washington	17	24 103	2472		4 94
Square 179. Chestnut, Coliseum, Jackson and Philip.						
City of New Orleans, high school	Chestnut	19, 20	69^{6} 127^{9}	8879		17 76
Square 196. Coliseum, Prytania, Sixth and Washington.						
Lafayette cemetery	Square		451 429	193479		386 96

65	Square 197. Coliseum, Prytania, Washington and Fourth. City of New Orleans ..... Washington	15	44[6]	129	5740	.....	11 48
	Square 235. St. Charles, Carondelet, Philip and Jackson. City of New Orleans, school..... Philip.....	21	27	131	3536	.....	7 06
	City of New Orleans, school..... Carondelet.....	5, 6	75	148	11.100	.....	22 20
	Square 99. Annunciation, Laurel, First and Philip. City of New Orleans, school..... Laurel.....	248 a	77	160	12320	.....	24 64
	All the public streets, public squares, (not especially assessed) and public alleys, in the portion of the district lying in New Orleans. City of New Orleans	.....	.....		34.863.950	.....	69,727 90

A true copy.

(Signed) DON GORDON, *D'y Clerk.*

66 I, Don Gordon, deputy clerk of the civil district court for the parish of Orleans do hereby certify that the foregoing pages 1, 2, 3, 4, 5, 6, 7 and 8 are true and correct copies of the original on file in clerk's office civil district court, parish of Orleans; that no opposition or answer was filed therein by the city of New Orleans as appears from the entries in the original dockets of said court; and that the judgments therein rendered are final and executory, and that the foregoing pages 9 and 10 are true and correct extracts from the copy of assessment-rolls marked No. 1, No. 2, No. 3 and No. 4 respectively on file in clerk's office in the foregoing entitled and numbered case and referred to in the foregoing judgments homologating said assessment-rolls.

[SEAL.] (Signed) DON GORDON,
D'y Clerk Civil District Court.

Certificate of recorder of mortgages referred to in foregoing petition and judgment thereon. Filed February 9th, 1861, to be found at pages 1, 2, 3, 4 of the foregoing pages.

(Stamps.) OFFICE RECORDER OF MORTGAGES,
PARISH OF ORLEANS, LA.

I, John Holmes, recorder of mortgages, hereby certify that on this 11th day of January, 1861, L. H. Place, Esq., president of the board of commissioners of the second draining district, has deposited in this office two plans certified as true copies of originals on file in the office of s'd commissioners by A. S. Phelps, engineer of said draining district, and dated 9th January, 1861, said plans comprising all the portion of said draining district lying in this parish and also has deposited in this office four books of assessments, comprising the subdivisions of the property included in said plans and the amounts required to be paid by the owners of said subdivisions in order to defray the estimated cost of drainage.

In faith whereof I have hereunto set my hand and seal at the mortgage office aforesaid.

[SEAL.] (Signed) COLOMBE DAVIS, *D'y Rec.*

Endorsed: Certificate of deposit of plans, etc., in the parish of Orleans, Jan'y 11, 1861. 15846. Filed Feb'y 9th, 1861. D. Jonelle, d'y clerk.

STATE OF LOUISIANA, }
Parish of Orleans. }

Clerk's Office, Civil District Court, Parish of Orleans.

I, Don Gordon, deputy clerk civil district court, parish of Orleans, do hereby certify that the foregoing page contains a true and correct copy of the original on file in said clerk's office of said civil district court in the above-entitled matter now No. 18995 of said civil district court.

[SEAL.] (Signed) DON GORDON, *D'y Clerk.*

67 3d district court, par. of Orleans. No. 25393. Now transferred to 18995, civil district court, parish of Orleans, and filed Oct. 20, '86.

In the Matter of the Board of Commissioners of the Second Draining District Praying for Homologation of Assessment-roll, etc. etc.

To the Honorable Francis A. Monroe, judge of the third district court for the parish of Orleans:

The petition of the Board of Administrators of the City of New Orleans and of the City of New Orleans respectfully represents:

That in conformity with the act of the legislature of the State of Louisiana entitled "An act to provide for the collection of the assessment for draining under the acts of March, 1858, and the act supplementary thereto of March 17th, 1859, a tableau or assessment-roll of the amount to be paid for draining the property in the second draining district (within the parish of Orleans) was prepared and notice thereof duly given.

That on the 16th day of June, 1868, the Board of Commissioners of the Second Draining District filed their petition with a copy of the assessment-roll of the second draining district (within the parish of Orleans) contained in bound volumes numbered 1, 2, 3 and 4 in the honorable the third district court of New Orleans in the suit or proceeding entitled: In the matter of the Board of Commissioners of the Second Draining District praying for homologation of assessment-roll, etc., number 15846 of the docket; that on said assessment-roll the property assessed was set forth, together with the amount assessed and the names of the owners thereof as far as known; and in case the owner or owners were unknown said fact was stated; and in said petition said commissioners prayed said court to order that all persons whom it might concern should show cause within thirty days from the first publication of said order, if any they had, why said assessment-roll should not be approved and homologated; that said order be published in the English and French languages in the New Orleans *Bee* newspaper twice each week for thirty days; and that after due proceedings had judgment be rendered approving and homologating said assessment-roll to operate as a judgment against the property assessed and the owner or owners thereof, for the amount of the assessments, with ten per cent. in addition to the amount assessed to pay costs and counsel fees; the whole according to the acts of the legislature aforesaid, found at pages 43 and 44 of the printed Sessions Acts of 1861.

That upon said petition and order of said court was duly granted in words and figures following, to wit:

"That upon filing the assessment-roll of the second draining district (within the parish of Orleans) and on the petition of the board of commissioners of said draining district, it is ordered that all persons whom it may concern do show cause, if any they have, within thirty days from the first publication of this order, why said

assessment-roll should not be approved and homologated.
68 And it is further ordered that said order be published in the English and French languages in the New Orleans *Bee* newspaper twice each week for thirty days.

"CHAS. M. EMERSON, *Judge.*

"New Orleans, June 16th, 1868."

That subsequently, to wit, on the 11th day of November, 1868, after due advertisement, proceedings and delays a final judgment was rendered upon said petition as follows, viz:

Third District Court. No. 15846.

In the Matter of the Board of Commissioners of the Second Draining District Praying for Homologation of Assessment-roll, etc. etc.

On motion of C. Roselius and Alfred Phelps of counsel for the Board of Commissioners of the Second Draining District, and on producing to the court due proof of the publication of notices in the English and French languages during thirty days in the New Orleans *Bee* a daily newspaper published in the city of New Orleans to all persons interested, to show cause if any they had why said assessment-roll filed by said board of commissioners should not be approved and homologated according to law. And on further producing proof that no opposition has been filed to the homologation and approval of the same,

It is now ordered, adjudged and decreed that said report and assessment-roll be approved and homologated, and to operate as a judgment against the property therein assessed and against the owner or owners thereof with ten per centum in addition to the amount assessed for counsel fees and costs; all according to the act of the legislature No. 57 approved March 14, 1861.

Judgment rendered November 11, 1868, signed November 16, 1868.

CHAS. M. EMERSON, *Judge.*

All of which will more fully appear and at large appear by reference to the aforesaid proceedings, and record No. 15846 of the docket of the late third district court of New Orleans.

Your petitioner further shows unto your honor that by act No. 30 of the Sessions Acts of the General Assembly of the State of Louisiana for the year 1871 entitled "An act to provide for the drainage of New Orleans" your petitioners were therein and thereby subrogated to all the rights, powers and facilities possessed and enjoyed by the commissioners of the several draining districts within the limits of New Orleans and Carrollton and were authorized and required to collect from the holders of property within the said districts the balance due on the assessments as shown by the books of the first, second and third drainage districts under the acts of March 18, 1859, and March 17, 1859, and the several supplementary and amendatory acts thereto.

69 That with a view to the proper exercise and performance of the rights, duties and privileges of your petitioners in the premises and out of an abundance of caution, your petitioners desire to have the aforesaid decree and judgment in the matter of the Board of Commissioners of the Second Draining District praying for homologation of assessment-roll, etc., No. 15846 of the docket of the late third district court of New Orleans rendered on the 11th and signed on the 16th of November, 1868, and transferred to this honorable court and numbered 25393 of the docket revived in conformity — law.

Wherefore, your petitioners pray that citation may issue herein, citing and admonishing all persons whomsoever it may concern to show cause if any they have or can why said judgment of homologation should not be revived; that said citation be made in manner and form as required by law and that after due proceedings had judgment may be rendered herein reviving said judgment rendered as aforesaid in the matter of the Board of Commissioners of the Second Draining District praying for homologation of assessment-roll, etc., etc., No. 15486 of the docket of the late third district court of New Orleans. And as in duty bound petitioners pray for general relief in the premises.

(Signed) B. F. JONAS,
City Attorney.
S. P. BLANC, *Of Counsel.*

Order Attached to Foregoing Petition.

STATE OF LOUISIANA:

Third District Court for the Parish of Orleans. No. 25393.

In the Matter of the Board of Commissioners of the Second Draining District Praying for Homologation of Assessment-roll, etc.

Whereas, a petition has been filed herein by the board of administrators of said city the legal successors and representatives of the late board of commissioners of the second draining district for the revival of the judgment rendered in the matter of "the Board of Commissioners of the Second Draining District praying for homologation of assessment-rolls" and being No. 15846 of the docket of the late third district court of New Orleans which was rendered on the 11th and signed on the 16th day of November, 1868:

Now all persons whom it may concern and all persons owning property affected thereby are hereby cited to appear and show cause, if any they have or can within thirty days from the first publication hereof why said judgments of homologation should not be revived.

New Orleans, November 9, 1878.

(Signed) F. A. MONROE, *Judge.*

Endorsed: No. 25393. Third district court, parish of Orleans.

70 In the matter of the Board of Commissioners of the Second Draining District praying for homologation of assessment-roll, etc., etc. Petition for revival of judgment. B. F. Jonas, city att'y; Sam. P. Blanc, of counsel. Filed November 9, 1878. Joe Garidel, d'y cl'k.

Endorsed: No. 18995. Civil district court. In the matter of the Board of Commissioners, Second Draining District. Copies of petitions praying judgment decreeing mortgage lien and privilege and homologating assessment-rolls, with extracts from same, showing amount of judg'ts against city of New Orleans. (Written in red ink:) $71,431.18, with interest. Exhibit "C" and homologation "3."

EXHIBIT "D."

Proceedings "In matter of City of New Orleans praying for decree of mortgage privilege, etc.," upon property in third draining district (said city acting under said act 30 of 1871), duly rendered by eighth district court, parish of Orleans, No. 7482 on docket of said court, on 4th day of May, 1872.

Filed with and made part of bill of complaint November 26, 1894.

(Written in red ink:)
Exhibit D from pages 1 to 4 inclusive with first five lines on 5th page together with clerk's certificate on page- 13 and 14.
(Stamps.)

No. 7482 of the late 8th district court, parish — Orleans, transferred to No. 26622, superior district court; transferred to No. 25394, third district court, parish of Orleans, transferred to No. 5608, civil district court, parish of Orleans.

To the honorable the judge of the eighth district court of the parish of Orleans:

The petition of the City of New Orleans subrogated by law to all the rights, powers and facilities possessed and enjoyed by the commissioners of the third draining district and of any corporation charged with the duty of draining and leveeing within the limits of the said districts herein appearing as subrogee as aforesaid, respectfully represents:

That agreeably to the provisions of an act entitled "An act to provide for leveeing, draining and reclaiming swamp lands in certain portions of the parishes of Orleans and Jefferson" approved March 18th, 1858, your petitioner has had a plan drawn by W. H. Bell, city surveyor of said city of a certain section or district of land lying within the parish of Orleans—described in the advertisements hereto annexed and made a part hereof, and in the said act as lying within the following limits: From the River Mississippi at St. Peter street along the lower side of said street to Canal Carondelet, following said canal to Bayou St. John, along said bayou to Lake Pont-

chartrain, along the shores of said lake to Lafayette avenue,
71 following said avenue to the River Mississippi, along the banks of said river to the starting point.

That said plans consisting of two maps and the accompanying tableau contained in five books accurately designates the limits of said section, and as much as possible, the subdivisions of property therein contained and the names of proprietors and also the divisions and directions of the canals intended to be dug and everything that is by the law required.

That a true copy of said plan was deposited in the office of the recorder of mortgages of this parish on the second day of March, 1872, and notices inserted in French and English in the New Orleans *Republican* and the New Orleans *Bee*, two newspapers published in the city of New Orleans, once a week during four weeks in succession, announcing that your petitioner is about to proceed to drain said section or district, describing the place where said plan is deposited, accurately defining the limits of said district, and indicating as nearly as possible, the time within which the draining thereof will be completed and the probable cost of said work ; all of which will more fully appear by reference to the certificate of the recorder of mortgages, and copies of said newspapers containing said notices, herewith filed.

Wherefore, the premises considered, your petitioner is entitled to and prays for a decree from this honorable court subjecting each portion of the property situated within the limits of said third draining district to a first-mortgage lien and privilege in favor of your petitioner in the capacity aforesaid for such amount as may be assessed on it for its proportion of the whole cost of the drainage of said section, in accordance with the provisions of the statute by which said privilege, lien and mortgage are created, and interest thereon at the rate of 6 *per cent. per annum* from demand thereof; and petitioner prays for such other and general relief as the nature of the case and the law may require.

And as in duty bound, etc., etc.

(Signed) RUFUS WAPLES,
Attorney for Petitioner.

A true copy.
DON GORDON, *D'y Clerk.*

Endorsement on the foregoing petition: "7482. Eighth district court. In the matter of the City of New Orleans praying for a decree of mortgage privilege, etc., upon the property of the third draining district. Petition. Rufus Waples, attorney. Filed 16 April, 1872. Robert Lynne, deputy clerk."

Judgment on the Foregoing Petition.

Considering the law and the performance by the petitioner of the necessary preliminaries and duties therein required, it is ordered, adjudged and decreed that each portion of the property situate within the limits of the third draining district in the parish of Or-

leans, and described in the advertisements and plans de-
72 posited by the city of New Orleans in the office of the recorder of mortgages of said parish as lying within the following limits: From the River Mississippi at St. Peter street, along the lower side of said street to Canal Carondelet, following said canal to Bayou St. John, along said bayou to Lake Pontchartrain, along the shores of said lake to Lafayette avenue, following said avenue to the River Mississippi, and along the banks of said river to the starting point, be and is hereby subject to a first-mortgage lien and privilege in favor of the petitioner, The City of New Orleans, in its capacity described in said petition and in the law as the subrogee to "all the rights, powers and facilities possessed and enjoyed" heretofore by the "board of commissioners of the third draining district and of any corporation heretofore charged with the duty of draining and leveeing within the limits of the said district" for such amount as may be assessed upon said property for its proportion of the whole cost of draining said district in accordance with the provisions of the statute creating said first-mortgage lien and privilege, with interest thereon at six per cent. per annum from demand thereof.

New Orleans, 4 May, '72.

(Signed) HENRY C. DIBBLE, *Judge.*

Endorsed: "Filed 4 May, '72. Robert Lyne, d'y cl'k."

A true copy.

DON GORDON, *D'y Clerk.*

(Written in red ink:) "Exhibit Homologation 4" from 7th line of page 5 to page 14 inclusive.

Petition.

Filed June 17, 1872.

Eighth District Court, Parish of Orleans. No. 7482.

In the Matter of the City of New Orleans Praying for the Homologation of Assessment-roll, etc.

To the honorable the judge of the eighth district court:

The petition of the City of New Orleans subrogated by law "to all the rights, powers and facilities" possessed and enjoyed by the commissioners of the several draining districts and of any corporation charged with the duty of draining and leveeing within the limits of the said district herein appearing as subrogee as aforesaid, respectfully represents:

That in conformity with the statute of the State entitled "An act to provide for the collection of the assessments for drainage under the acts of March 18, 1858, and the act supplementary thereto of March 17, 1859," a tableau or assessment-roll of the amount to be paid for the purpose of draining and leveeing the property within the third draining district described by law and by the petition heretofore filed in these proceedings has been prepared by your

73 petitioner as required by the acts aforesaid and the act entitled "An act to provide for the drainage of New Orleans" No. 30 of the acts of 1871 and due notice thereof has been given; that your petitioner has filed a copy of said tableau or assessment-roll in this court, and in these proceedings, in which the property assessed is set forth and described together with the amount assessed and the name of the owner thereof as far as known and in case the owner or owners are unknown, said fact is stated; all of which together with other necessary particulars will more fully appear by reference to said copy, containing altogether 546 pages, the first volume from 1 to 95th page inclusive the second from the 96th to the 190 inclusive the third from the 191st to the 305th inclusive, the fourth from the 306th to the 424 inclusive; and the fifth from the 425 to the 546th page inclusive, now marked by the clerk A, B, C, D, E, respectively to identify them herewith and your petitioner makes them part of this petition.

That your petitioner is by law charged to make assessments in those parts of the three draining districts as existing under and created by the acts of March 18, 1858, and March 17, 1859, and amendments thereto and on such other lands as are brought within the protection levees contemplated by the act above cited of the session of 1871, "where no assessments have been made, and to execute and enforce the same as provided by the several acts of the legislature creating and regulating said boards of draining commissioners."

And your petitioner avers that all the preliminaries required of your petitioner have been complied with, contract made, etc., and that prior to the passage of said act of 1871 no assessment for draining and leveeing purposes under the act of 1858 and its supplements had ever been made upon the lands in the said third draining district.

Your petitioner therefore prays the court to order that all persons whom it may concern do show cause within thirty days from the publication of the order to that effect if any cause they have, why said assessment-roll should not be approved and homologated, that said order be published in French and English in the official journal twice a week for thirty days; and that after due proceedings had, judgment be rendered approving and homologating said assessment-roll to operate as a judgment against the property assessed and the owner or owners thereof respectively, for the amount of assessment against each for the purpose of paying the expenses of the draining and leveeing the said third drainage district as contemplated by all the acts aforesaid with ten per centum in addition to the amount assessed to pay cost and counsel fees as provided by law and six per cent. per annum interest from the date of the assessment in accordance with the said acts of the General Assembly, and that said amounts be collected in the manner provided by said acts.

And your petitioner prays for all other and further necessary orders and for general relief.

(Signed) RUFUS WAPLES,
Att'y for Petitioner.

74 *Order.*

The assessment-roll of the third draining district having been filed in court and the city of New Orleans as successor and subrogee of the board of commissioners of the several draining districts having filed a petition for the homologation of said assessment-roll, it is

Ordered that all persons whom it may concern do show cause, if any they have within thirty days from the first publication of this order why said assessment-roll should not be approved and homologated. And it is further ordered that this order be published in the English and French languages in the New Orleans *Republican* newspaper twice each week for thirty days.

New Orleans, June 17, 1872.

(Signed) HENRY C. DIBBLE, *Judge.*

Eighth District Court for the Parish of Orleans. No. 7482.

In the Matter of the City of New Orleans Praying for a Decree of Mortgage Privilege, etc., upon the Property of the Third Drainage District.

On motion of Rufus Waples, attorney for the petitioner in the above-entitled case, and on producing to the court due proof of the publication of notice by the publication of the order of this court in the English and French languages, twice a week during thirty days, in the New Orleans *Republican*, a daily newspaper published in the city of New Orleans, to all persons interested to show cause why the assessment-roll filed by said petitioner should not be approved and homologated according to law, and on further suggesting that all legal requirements have been observed,

And on further suggesting that he herewith files a certificate of the clerk to this honorable court that no opposition to the homologation of said assessment-roll has been filed, it is now ordered, adjudged and decreed that the law and the evidence considered that said assessment-roll be and is hereby approved and homologated; and this approval and homologation shall operate as and is a judgment against the property described as assessed in said roll and also against the owner or owners of each property respectively with ten per centum in addition to the amount assessed for counsel fees and costs, as provided by law, with interest at the rate of 6 per centum per annum on each amount from the date of the assessment thereof according to law.

Judgment rendered Nov. 8th, 1872, and signed Nov. 13, 1872.

(Signed) HENRY C. DIBBLE, *Judge.*

This day, December 15, 1886, exhibited to me a true copy of a copy duly certified to of the original, being now missing from this office.

(Signed) DON GORDON,

D'y Clerk Civil District Court, Parish of Orleans.

75 Extract from the copy of assessment-rolls of the third district. Filed in the eighth district court, parish of Orleans, on the 4th day of May, 1872, and referred to in the petition praying for the homologation of said assessment-rolls and in the foregoing judgment homologating said assessment-rolls, rendered on the 8th and signed on the 13th November, 1872.

Names of owners of land.	Name of street.	No. lot.	Measurement.	Superficial feet.	Percentage.	Assessment.
Square 3. St. Anne, Dumaine, Decaturu, Public road.						
City of New Orleans	Meat market		320 60	19,200		38 40
Square 10. Decatur, Peters, St. Philip.						
City of New Orleans	French market			5,680		11 35
Square 11. St. Philip, Peters, Decaturu, Urselines.						
City of New Orleans	Vegetable market			29,731		59 25
Square 24. Decaturu, Chartres, St. Peter, St. Anne.						
City of New Orleans	Jackson square			115,921		231 85
Square 45. Chartres, Royal, Orleans, both sides.						
St. Anthony square	Royal	2	150.107	16,050		32 10
Square 46. St. Anne, Orleans, Chartres, Royal.						
City court-house	Chartres		117.200	23,400		46 80
Square 43. Chartres, St. Peter, Orleans, Exchange alley.						
State arsenal and court-house	Orleans and St. Peter.	3	107.125	13,493		27 00
Square 82. Hospital, Dauphine, Barracks, Burgundy.						
City of N. O., Barracks school-house	Barracks	9	60.118	7,080		14 15
Square 113. St. Philip, Dumaine, Rampart, St. Claude.						
Engine-house No. 10, city of N. O.	Dumaine	21	33.107	3,531		7 05
Square 115. St. Peter, St. Anne, Rampart, St. Claude.						
City of New Orleans	Place D'Armes or Congo square		370 320	118,400		236 80
Square 149. St. Anne, Orleans, Liberty, and Marais.						
Parish prison and police jail				35,779		71 55
Square 166. Orleans, both sides Marais to Robertson.						
Treme market			57.$\frac{111}{115}$	29,184		58 35
Square 167. Orleans, St. Anne, Marais, Villere.						
School-house, city	do. to Orleans.	13	141.81	11,421		22 85
Square 210. Orleans, St. Peters, Claiborne, Derbigney.						
Engine-house 21	S. Claiborne & St. Peter.	1	57.74	4,218		8 45
Square 211. St. Peters, Carondelet walk, Claiborne, and Derbigny.						
Public school-house	Cla. Ca. W. to St. Peter.	1	30.182	5,460		10 95

Names of owners of land. Name of street.	No. lot.	Measurement.	Superficial feet.	Percentage.	Assessment.
Square 230 and 231. Derbigny, Bayou R., Roman, Barracks, Esplanade.					
City of New Orleans.....Bayou R. and Roman...	5	51.61	3,111	.....	6 20
Square 289. Barracks, Bayou R., Galvez, Miro, Esplanade.					
Engine-house No. 3.....Bayou Rd. and Galvez..	8	20.158	3,160	.....	6 30
Square 4. Esplanade, Decaturu, Frenchman.					
Creole Fire Co. No. 9.....	.....	.....	1,921	.....	3 85
Square 9. Marigny, Mandeville, Decaturu, Peters.					
Phœnix Fire Co. engine.....	2	44.75	3,300	.....	6 60
Square 160. Frenchman, Elysian Fields, Dauphine, Royal.					
Washington square.....	.....	309.309	95,917	.....	191 85
Square 161. Elysian Fields, Marigny, Royal, Dauphine.					
Recorder's office and police station.....	6	36.131	4,710	.....	9 40
Square 371. Spain, Mandeville, St. Claude, Rampart.					
City of New Orleans—					
De Soto school.....Mandeville.....	2	53 155	8,215	.....	16 45
De Soto school.....Spain.....	14	53.155	8,215	.....	16 45
Square 386. St. Anthony, St. Claude, Bagatelle, and Marais.					
Fillmore school.....	15	64.128	8,192	.....	16 40
Square 879.					
Independence square.....	.....	690.289	198,813	.....	397 60
Square 1037. Onzaga, Lapeyrouse, Johnson, Galvez.					
City of New Orleans.....	10 lots 7	698.100	29,800	.....	59 60
Square 2147. Mandeville, Spain, Humanity, Pleasure.					
City of New Orleans.....Square.....	.....	.....	98,955	.....	197 90
Square 2149.					
Union square.....	.....	.....	189,000	.....	378 00
Square 2844. Elysian Fields, Gentilly, Cato, Frenchm., Solon.					
Public school.....Frenchmen and Solon...	1	212.200	25,440	.....	59 90
City of New Orleans—All the public streets from St. Peters at above to Lafayette Ave. below from the River Mississippi to Lake Pontchartrain.....	.....	.....	102,513,396	.....	$205,026 79

A true extract from the copy on file in the civil district court. (Signed) DON GORDON, *D'y Clerk Civil District Court.*

77 I, Don Gordon, deputy clerk civil district court parish of Orleans, do certify that the first, second, third, fourth, as well as lines 1 to 5 on the fifth page of the foregoing pages, is a true and correct copy of the original on file, in clerk's office, civil district court, parish of Orleans; that page 5, from the 7th line thereof to the bottom of said page, together with the sixth, seventh, eighth, ninth and tenth pages are true and correct copies of a duly certified copy of the original thereof, this day exhibited to me, said certified copy being filed on the 24th day of August, 1883, in the United States circuit court, eastern district of Louisiana, No. 10337 of said court, the original being missing from the clerk's office of said civil district court; that no answer or opposition was filed by the city of New Orleans, in any of said proceedings, as appears from the dockets of said courts when said proceedings were had. And I further certify that the judgments set forth in the foregoing papers are final and executory, and the foregoing extracts from the assessment-rolls, marked respectively "A," "B," "C," "D" and "E," for the third draining district, are true and correct extracts from the copy of assessment-rolls filed in the foregoing matters, and referred to in the foregoing judgments homologating said assessment-rolls.

New Orleans, Dec. 15, 1886.

[SEAL.] (Signed) DON GORDON,
Deputy Clerk Civil District Court.

Certificate of Recorder of Mortgages Referred to in Foregoing Petition. Filed 16th April, 1872, Pages 1, 2, and 3 of Foregoing Pages.

(Stamps.) OFFICE RECORDER OF MORTGAGES,
PARISH OF ORLEANS.

I hereby certify that on this 2nd day of March, 1872, Alfred Shaw, administrator of public accounts of the city of New Orleans, has deposited in this office a plan by W. H. Bell, city surveyor, of this date, said plan being said to comprise all the portion of the third drainage district lying in this parish. And also that he has deposited in this office five books comprising the subdivisions of the property included in said plan. Also a plan of the canals intended to be dug and the place where the steam-engines will be established.

(Signed) M. A. SOUTHWORTH, *Rec. Mort.*

Endorsed: Recorder of mortgages' receipt for map and tableaux of 3rd draining district, March 2, 1872. Filed 16th April, 1872. Robert Lynne, d'y clerk.

STATE OF LOUISIANA, }
Parish of Orleans. }

Clerk's Office, Civil District Court, Parish of Orleans.

I, Don Gordon, deputy clerk civil district court, parish of Orleans, do hereby certify that the foregoing page 15 is a true and

78 correct copy of the original on file in the clerk's office of the civil district court of the parish of Orleans, in the above-entitled matter, now No. 5608 of said civil dist. court.

(Signed) DON GORDON, *D'y Clerk.*

Proof of publication referred to in judgment homologating assessment-rolls rendered on the 8th and signed on the 13th of November, 1872, and found at pages 9 and 10 of foregoing pages.

Eighth District Court, Parish of Orleans. No. 7482.

In the Matter of the City of New Orleans Praying for a Decree of Mortgage and Privilege, etc., upon the Property of the Third Drainage District.

I hereby certify that no opposition to the homologation of the assessment-roll filed herein, has been filed, and that the order of court has been duly published twice a week for thirty consecutive days in the official journal, the New Orleans *Republican*, notifying all persons to make opposition and to show cause, if any they had, why said roll should not be approved and homologated.

New Orleans, November 8th, 1872.

(Signed) ROBERT LYNNE,

[SEAL.] *D'y Cl'k Eighth District Court.*

Endorsed: 7482. Clerk's certificate. Filed Nov. 8th, 1872. O. M. Tennison, d'y cl'k.

STATE OF LOUISIANA,
Parish of Orleans, Clerk's Office,
Civil District Court, Parish of Orleans, } ss:

I, Don Gordon, deputy clerk of the civil district court of the parish of Orleans, do hereby certify that the foregoing pages 15, 16 and 17 are true and correct copies of the original on file in the clerk's office of said civil district court, parish of Orleans, in the above-entitled matter and now numbered 5608 of said civil district court.

[SEAL.] (Signed) DON GORDON, *D'y Clerk.*

Copy of Petition and Order for Revival of Judgment.

Civil District Court, Parish of Orleans, State of Louisiana. No. 5608.

In the Matter of the City of New Orleans Praying for a Decree of Mortgage Privilege, etc., upon Property in the Third Draining District.

To the honorable the judges of the civil district court, parish of Orleans, division A:

The petition of the City of New Orleans a municipal corporation chartered and duly organized under the laws of the State of Louisiana, located in the parish of Orleans, in said State, and of the board of administrators of the said city, respectfully represent:

79 That heretofore, to wit, on or about the 4th day of May, A. D. 1872, a judgment was duly rendered and signed, in the above-entitled proceeding, by the honorable the judge of the late eighth district court of the parish of Orleans, State aforesaid, declaring all the property situate, lying and being in the third drainage district, subject to a first-mortgage lien and privilege; and on or about the 8th day of November, 1872, a final judgment was duly rendered by the court aforesaid, and signed on the 13th day of said month homologating and approving the assessment-roll of the third drainage district; and condemning the property-owners named on the said roll to pay a personal judgment for such amount as shall have been placed opposite their names upon the said assessment-roll; made under and in conformity to certain acts of the General Assembly of the State of Louisiana, in such case provided.

That for greater certainty petitioners respectfully refer to the aforesaid judgment and make the same a part of this petition together with the assessment-roll of the third drainage district underlying the aforesaid judgment of homologation.

Petitioners further show that, in their opinion it is unnecessary to take proceedings for the revival of the judgments had and obtained as aforesaid; but to prevent the rights of all parties interested therein from being clouded over; and, out of an abundance of caution, your petitioners, without waiving or abandoning any privileges or rights conferred by the judgments aforesaid desire to supplement the same, by an order or decree of revival.

Wherefore, your petitioners pray that the several parties named or designated in the aforesaid tableau of assessments; and the owner or owners of all property referred to therein, whether such owners be known or unknown, by an order of this honorable court to be made and granted herein, may be cited and required to show cause within thirty days from the first publication of said order, if any they can, why the judgments aforesaid should not be regarded as being revived and possessing their original force and effect.

That an attorney *ad hoc* may be appointed by this honorable court to represent any and all of such defendants in the aforesaid judgments as may be absent and not represented; that the said attorney *ad hoc* may be cited to appear and answer this petition; that this cause may be otherwise proceeded in according to law and after due proceedings had the judgments aforesaid may be decreed to be revived and to have the original force and effect and that petitioner may have such other and further order, judgment and decree as may be suited to law and the nature of this case.

(Signed) C. F. BUCK, *City Attorney.*
LACY & BUTLER, *Of Counsel.*

80 Civil District Court, Parish of Orleans, Division —. No 5608.

In the Matter of the City of New Orleans Praying for a Decree of Mortgage Privilege, etc., upon the Property of the Third Drainage District.

Upon reading the foregoing petition, it is hereby ordered that the several parties named and designated in the tableau of assessments referred to in and homologated by a judgment of the honorable the late eighth district court of the parish of Orleans, State of Louisiana, in the above-entitled proceeding, rendered on the eighth day of November, 1872, and signed on the 13th day of the same month, do show cause, within thirty days after the first publication of this order, if any they have, why the said judgment of homologation and the preliminary judgment referred to in the petition should not be revived and held to possess their original force and effect.

It is further ordered that Meyer Gutheim, Esq., be and he is hereby appointed curator *ad hoc* to represent herein all such of the defendants in the aforesaid judgments as are absent and not represented; and that said curator *ad hoc* be cited and served with a copy of the petition for revival herein filed.

New Orleans, La., March 28th, 1882.

(Signed) A. L. TISSOT, *Judge.*

Endorsed: No. 5608. Civil district court, parish of Orleans, div. A. In the matter of the City of New Orleans praying for a decree of mortgage privilege, etc., upon the property of the *third drainage district.* Petition for revival of preliminary judgment and judgment homologating assessment-roll. C. F. Buck, city attorney. Lacy & Butler, of counsel. Filed March 18th, 1882. E. A. Luminais, d'y cl'k.

Endorsed: No. 5608. Civil district court. In the matter of the Board of Commissioners Third Draining District. Copies of petitions praying judgments, decreeing mortgage lien and privilege and homologating assessment-roll with extracts from rolls showing am't of judgments against city of New Orleans. $207,441.46. (Written in red ink:) Exhibit D and "homologation 4."

EXHIBIT "E."

Proceedings in matter of board of administrators praying for recognition of mortgage and recovery of assessments in fourth draining district—administrators acting under act 30 of 1871—rendered by superior district court, parish of Orleans, in No. 807 on docket of said court, on 29th day of January, 1873, and signed on the 3rd day of February, 1873. Filed with and made part of bill November 26, 1894.

(Stamps.)

To the Hon. Jacob Hawkins, judge of the superior district court of the parish of Orleans:

The petition of the City of New Orleans, a municipal corporation

chartered by the laws of the State of Louisiana and domiciliated in the parish of Orleans, State aforesaid, and of the board of administrators of said city, herein appearing, jointly and severally with the said city, respectfully represents:

That heretofore, to wit: on or about the 18th day of March, 1858, the legislature of Louisiana, with a view to drain and reclaim the parishes of Orleans and Jefferson, passed an act entitled "An act to provide for leveeing, draining and reclaiming swamp lands in certain portions of the parishes of Orleans and Jefferson," and in and by the said act created and established these draining districts known and designated as the first, second and third draining districts; as will more fully and at large appear from the act aforesaid, to which for greater certainty your petitioners respectfully refer.

Further, they show that by an amendatory statute of the General Assembly aforesaid, approved on the 17th day of March, A. D. 1859, the several boards of commissioners provided for by the act passed in the preceding year, among other things, were authorized and required to fix and determine the amount of assessment to be levied upon the superficial, or square, foot of land, situated within the draining district, as will more fully and at large appear from the aforesaid act, and to which your petitioners respectfully refer your honor.

Further they show, that in the year 1871, the General Assembly of Louisiana, adopted act No. 30, entitled "An act to provide for the drainage of New Orleans;" and therein and thereby, and with a view to raise funds for the payment of the work therein contemplated to be done by the Mississippi — Mexican Gulf Ship Canal Company, the board of administrators of New Orleans were subrogated to all the rights, powers and facilities enjoyed by the aforesaid commissioners of the several draining districts, and of every corporation, if any there were charged with the duty of draining and leveeing within the limits of the cities of New Orleans and Carrollton.

Further they show, that in and by the act last referred to, the board of administrators aforesaid, was fully empowered to establish a draining district additional to those created by the act of March 18, 1858, and March 17th, 1859; and were authorized and required to make an assessment of two mills per superficial foot, on those parts of the original draining districts, and on such other lands as might be brought within the protection levees contemplated by the aforesaid act No. 30, where no assessments have been made; as will more fully appear from act No. 30 aforesaid and to which, for greater certainty, your petitioners refer.

Further, they show that by an ordinance of the city council of the city of New Orleans, adopted February 6th, 1872, and known and designated as No. 1359, A. S., the fourth drainage district was established with the following limits or boundaries, viz:

Commencing on the left bank of the River Mississippi, at the point of intersection with Lafayette avenue, thence continuing down the said river to the point of intersection with Fishermen's canal,

thence running back from the said river, a distance of 9,900 feet, or thereabouts, to Bayou Bienvenue and Florida walk; thence
82 continuing along Florida walk, for a distance of 15,914 feet or thereabouts, so as to connect, through a curved line of 338 feet additional, with Lafayette and People's avenue, at a point distant from the Mississippi river of 9,600 feet, or thereabouts; and thence along Lafayette avenue to the place of beginning.

That your petitioners being prepared to drain the section or district hereinabove particularly set forth and bounded, provided certain books and plans of the said section or district, therein accurately designating the limits of the district, and showing, as far as possible, the subdivision of the property therein contained the names of the proprietors, the dimensions and directions of the canals intended to be dug, and the place where the steam-engine will be established; and, on the 12th day of November, 1872, your petitioners deposited the aforesaid books and plans with the recorder of mortgages, of the parish of Orleans, as will more fully appear from the receipt of such officer hereunto annexed and made a part hereof.

Further, they show that after the deposit aforesaid, your petitioner- caused notices to be inserted, in French and English, in two newspapers published in the city of New Orleans at least once a week, during four weeks in succession, announcing that petitioners would proceed to drain the fourth section, or district, aforesaid, designating the place where the plan thereof was deposited, and indicating as near as possible, the time within which the draining of said district would be completed, and the probable cost of the work; as will more fully appear from the notices and papers aforesaid, filed herewith and made a part hereof.

Further your petitioners show unto your — that by an ordinance of the city council adopted November 19, 1872, known as No. 1877 an assessment of two mills per superficial foot, in accordance with the authorization and requirement of the statute of the State of Louisiana, was levied and imposed upon all the lands comprised within the fourth drainage district aforesaid, as will more fully appear from a certified copy of such ordinance hereto annexed and made a part hereof.

The premises considered your petitioners pray for a decree from this honorable court, subjecting each portion of the property situated within the limits of the 4th draining district or section aforesaid, to a mortgage lien and privilege in favor of your petitioners for the objects and purposes contemplated and prescribed by law, particularly by act No. 30 of the State of Louisiana passed in the year 1871 for such amounts as *is*, or may be assessed, upon such property for its proportion of the costs of draining such district, or section, in accordance with the provisions of the statute or statutes, by or under, which said privilege, lien and mortgage are recognized authorized or created; and interest thereon at the rate of six per cent. per annum, from demand thereof, together with all costs; and such other and general relief as the nature of the case, and the law, may require.

(Signed) GEO. S. LACEY, *Attorney.*

83 Superior District Court, Parish of Orleans. No. 807.

In the Matter of Board of Administrators Praying for Recognition of Mortgage and Recovery of Assessments in 4th Drainage District.

On motion of George S. Lacey, attorney for the board of administrators of this city of New Orleans, and for said city, acting herein for the purposes and objects provided by law, particularly act No. 30 of the General Assembly of Louisiana passed in the year 1871, and upon due proof of the facts and allegations set forth and contained in the petition filed herein, more particularly the publication of notice in two public newspapers for the time and in the manner required by law and the law and evidence authorizing the same.

It is ordered, adjudged and decreed that each portion of the property situate in the fourth draining district, bounded and described as follows: Commencing on the left bank of the River Mississippi, at the point of intersection with Lafayette avenue, thence continuing down the said river to the point of intersection with Fishermen's canal, thence running back from the said river a distance of 9,900 feet, or thereabouts, to Bayou Bienvenue and Florida walk for a distance of 15,914 feet, or thereabouts, so as to connect through a curved line of 338 feet additional, with Lafayette and People's avenue- at a point distant from the Mississippi river of 9,600 feet, or thereabouts; and thence along Lafayette avenue to the place of beginning, be, and the same is hereby subject to a first mortgage, lien and privilege in favor of petitioners, the city of New Orleans and the board of administrators of said city, for such amount as is or may be assessed upon said property for its proportion of the whole costs and expenses of draining the aforesaid district in accordance with the law, and particularly act No. 30 above referred to in such case made and provided, creating and continuing said first mortgage, lien and privilege with interest thereon at six per cent. per annum from demand thereof.

Rendered January 29th, 1873.
Signed February 3d, 1893.
(Signed) JACOB HAWKINS, *Judge.*

OFFICE OF RECORDER OF MORTGAGES,
PARISH OF ORLEANS.

I hereby certify that on this 12th day of November, 1872, Alfred Shaw, administrator of public accounts of the city of New Orleans has deposited in this office a plan by W. H. Bell, city surveyor of this date, said plan being said to comprise all the portion of the fourth draining district lying in this parish. And also that he has deposited in this office two books said to comprise the subdivisions of the property included in said plan.

Also a plan of the canals intended to be dug, and the place where the steam-engines will be established.

(Signed) M. A. SOUTHWORTH, *Rcd. Mort.*

"Duplicate."

84 N. ORLEANS, *Nov.* 12, 1872.

Rec'd of the city of New Orleans, $20, for the deposit of drainage plans and the evidence of the decree thereof.

(Signed) M. A. SOUTHWORTH, *Rcd. Mort.*

"Duplicate."

A true copy. New Orleans, March 29th, 1888.

[SEAL.] (Signed) M. A. McDONNELL, *D'y Cl'k.*

Endorsed: No. 6099. Third district court. In the matter of the board of administrators praying for recognition of mortgage and recovery of assessments in 4th drainage district.

EXHIBIT "HOMOLOGATION 5."

Superior District Court, Parish of Orleans. No. 807.

In the Matter of the Board of Administrators Praying for Recognition of Mortgages and Recovery of Assessments.

Petition to homologate, etc; affidavit. Geo. S. Lacey, att'y.

Filed February 7, 1873. (Signed) O. M. Tenison, d'y cl'k.

To the Honorable Jacob Hawkins, judge of the superior district court of the parish of Orleans:

The petition of the City of New Orleans, a municipal corporation, chartered by the laws of the State of Louisiana, and domiciliated in the parish of Orleans State aforesaid, and of the board of administrators of said city, herein appearing jointly and severally with the said city, respectfully represents:

That heretofore, to wit: on or about the 18th day of March, 1858, the legislature of Louisiana, with a view to drain and reclaim the parishes of Orleans and Jefferson, passed an act entitled "An act to provide for leveeing, draining and reclaiming swamp lands in certain portions of the parishes of Orleans and Jefferson," and in and by the said act created and established three draining districts known and designated as the first, second and third draining district; as will more fully and at large appear from the act aforesaid, to which for greater certainty your petitioners respectfully refer.

Further, they show that by an amendatory statute of the General Assembly aforesaid, approved on the 17th day of March, A. D. 1859, the several boards of commissioners provided for by the act passed in the preceding year, among other things were authorized and required to fix and determine the amount of assessment to be levied upon the superficial or square foot of land, situated within the draining district or section of such board or boards; as will more fully and at large appear from the aforesaid act, and to which your petitioners respectfully refer your honor.

Further, they show that in the year 1871 the General Assembly

of Louisiana adopted act No. 30 entitled "An act to provide
85 for the drainage of New Orleans," and therein, and thereby, and with a view to raise funds for the payment of the work therein contemplated to be done by the Mississippi and Mexican Gulf Ship Canal Company the board of administrators of New Orleans were subrogated to all the rights, powers and facilities enjoyed by the aforesaid commissioners of the several draining districts, and of every corporation, if any there were, charged with the duty of draining and leveeing within the limits of the cities of New Orleans and Carrollton.

Further they show that in *any* and by the act last referred to the board of administrators aforesaid was fully empowered to establish a draining district additional to those created by the act of March 18, 1858, and March 17, 1859; and were authorized and required to make an assessment of two mills per superficial foot, on those parts of the original draining districts, and on such other lands as might he brought within the protection levees contemplated by the aforesaid act No. 30, where no assessments have been made, as will more fully appear from act No. 30 aforesaid, and to which, for greater certainty, your petitioners refer.

Further, they show that by an ordinance of the city council of the city of New Orleans, adopted February 6, 1872, and known and designated as No. 1359, A. S., the fourth drainage district was established with the following limits or boundaries, viz:

Commencing on the left bank of the River Mississippi at the point of intersection with Lafayette avenue; thence continuing down the said river to the point of intersection with Fisherman's canal; thence running back from the said river a distance of 9,900 feet, or thereabouts, to Bayou Bienvenue and Florida walk, for a distance of 15,914 feet or thereabouts, so as to connect, through a curved line of 338 feet additional, with Lafayette and People's avenue-, at a point distant from the Mississippi river of 9,600 feet or thereabouts and thence along Lafayette avenue to the place of beginning.

That your petitioners, being prepared to drain the section or district hereinabove particularly set forth and bounded, provided certain books and plans of the said section or district, therein accurately designating the limits of the district, and showing, as far as possible, the subdivision of the property therein contained, the names of the proprietors, the dimensions and the directions of the canals intended to be dug, and the place where the steam-engine will be established; and, on the 12th day of November, 1872, your petitioners deposited the aforesaid books and plans with the recorder of mortgages, of the parish of Orleans, as will more fully appear from the receipt of such officer, hereunto annexed and made part hereof.

Further, they show that after the deposit aforesaid, your petitioners caused notices to be inserted, in French and English, in two newspapers published in the city of New Orleans, at least once a week, during four weeks in succession, announcing that petitioners would proceed to drain the fourth section, or district aforesaid, designating the place where the plan thereof was deposited, and indicating, as

near as possible, the time within which the draining of the said district would be completed, and the probable cost of the
86 work; as will more fully appear from the notices and papers aforesaid, filed herewith and made a part hereof.

Further, your petitioners show unto your honor, that by an ordinance of the city council adopted November 19th, 1872, known as No. 1877, an assessment of two mills per superficial foot, in accordance with the authorization and requirement of the statute of the State of Louisiana, was levied and imposed upon all the lands comprised within the fourth drainage district aforesaid; as will more fully appear from a certified copy of such ordinance, hereto annexed and made a part hereof.

And your petitioner- further show unto your honor, that they have made and completed a tableaux of assessment of property lying within the fourth drainage district, or section aforesaid, and therein have set forth the property described, together with the amount of tax imposed, also the names of the owners of such property, when known and when not known, a statement that the property assessed belongs to owners unknown; and have caused notice of the completion of such tableaux, and the filing of the same in the office of the recorder of mortgages of the parish of Orleans, and in the office of the clerk of this honorable court, and also in the office of the administrator of public accounts of the city of New Orleans, to be given by publication in the English and French languages, in the New Orleans *Bee* and *Republican* for the time required by law—a copy of which notice is hereto annexed and made a part hereof.

The premises considered, your petitioners pray for an order requiring all persons, whom it may concern, to show cause, within thirty days from the first publication of said order, if any they have, why said assessment-roll should not be approved, homologated and made the judgment of the court. That in due course of law, the said tableaux may be homologated and approved; and that judgment he rendered for the amount set forth in the assessment-roll, together with interest at the rate of six per cent. per annum from the time of demanding payment of the amount assessed, and also ten per cent. in additional to the amount awarded, with interest to be paid to the attorney of petitioners, for counsel fees herein, and that such other and further order, judgment and decree may be entered as is suited to law and the nature of the case.

(Signed) GEO. S. LACEY, *Attorney.*

Superior District Court, Parish of Orleans. No. 807.

In the Matter of Board of Administrators Praying for a Recognition of Mortgage and Recovery of Assessments in Fourth Drainage District.

Geo. S. Lacey, attorney for petitioners, being duly sworn doth depose and say that the tableaux of assessments referred to in the foregoing petition having been completed, notice of such completion and the filing of said tableaux in the office of the recorder of

mortgages of the parish of Orleans, and in the office of the
87 clerk of the superior district court, and also in the office of the administrator of public accounts of the city of New Orleans, was given by publication in the French and English languages, in the New Orleans *Republican* and New Orleans *Bee* public newspapers published in the city of New Orleans, on the 30th and 31st days of January and on the 1st, 2d, 3rd, 4th, 5th, 6th, 7th days of February A. D. 1873, as will more fully appear from copies of said newspapers filed with this affidavit and with the petition to which the same is attached.

(Signed) GEO. S. LACEY.

Sworn to and subscribed before me this 7th day of February, A. D. 1873.

(Signed) O. M. TENISON, *D'y Clerk.*

Superior District Court, Parish of Orleans. No. 807.

In the Matter of the Board of Administrators Praying for Recognition of Mortgage and Recovery of Assessments in 4th Drainage District.

On motion of Geo. S. Lacey, attorney, and upon filing and accompanying affidavit together with New Orleans *Republican* and New Orleans *Bee*, it is ordered that all persons whom it may concern, show cause within thirty days from the first publication of this order, if any they have, why the assessment-roll of the property lying within the fourth drainage district of the city of New Orleans, comprised within the following limits, viz: Commencing on the left bank of the Mississippi river, at the point of intersection with Lafayette avenue, thence continuing down the said river to the point of intersection with Fisherman's canal thence running back from the river a distance of 9,900 feet or thereabouts, to Bayou Bienvenu and Florida walk; thence continuing along Florida walk for a distance of 15,914 feet or thereabouts, so as to connect through a curved line of 338 feet additional, with Lafayette and People's avenue-, at a point distant from the Mississippi river of 9,600 feet or thereabouts; and thence along Lafayette avenue to the place of beginning, should not be approved and homologated, and judgment of the court be rendered in manner and form as prayed for in the petition on file.

Dated New Orleans, February 10th, A. D. 1873.

(Signed) JACOB HAWKINS, *Judge.*

CLERK'S OFFICE, SUP'R DISTRICT COURT,
NEW ORLEANS, *October* 19, 1874.

I hereby certify *that* the foregoing petition, affidavit and order, to be true copies of the original filed, in the matter of the 4th drainage district, No. 807 of the docket of this court.

(Signed) JOHN BURKE, *Clerk.*

88 STATE OF LOUISIANA:

Superior District Court for the Parish of Orleans.

To city of New Orleans, all the streets from Lafayette avenue to lower parish line, from the Mississippi river to Florida avenue.

I hereby certify, that on the 15th day of March, 1873, judgment was rendered in this court, in the following-entitled suit, viz:

Sup'r Dist. Court, Parish of Orleans. No. 807.

In the Matter of the Board of Administrators Praying for Recognition of Mortgage and Recovery of Assessments in the 4th Drainage District.

Homologating the tableaux of assessments and condemning you to pay the sum of sixty-five thousand nine hundred and fifty-six dollars and seventy-five cents, with six per cent. per annum interest thereon, from the 29th day of January, A. D. 1873, until paid; also ten per cent. upon the amount aforesaid for attorneys' fees and costs of suit; with a decree of mortgage, and lien and privilege upon certain property belonging to city of New Orleans and described and designated on said tableaux for the payment of the amount hereinabove set forth.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said court, at the city of New Orleans on this 21st day of March, in the year of our Lord one thousand eight hundred and seventy-three, and the ninety-seventh year of the Independence of the United States.

(Signed) J. BURKE, *Clerk.*

Received May 30, 1873, and on the thirty-first day of the same month and year, served copy of the within judgment on The City of New Orleans, defendant herein, by leaving same at the office of the Hon. Louis A. Wiltz, mayor of said city in the city hall, corner St. Charles and Lafayette streets in the hands of E. W. Halsey his secretary, who informed me that the mayor was absent from his office, at the time of said service.

Returned same day.

Sheriff's fee $-.50.

(Signed) B. N. LACOSTE, *D'y Sheriff.*

A true copy:

(Signed) J. J. HANNON, *D'y Clerk.*

89 STATE OF LOUISIANA:

Superior District Court for the Parish of Orleans.

I hereby certify, that on the 15th day of March, 1873, judgment was rendered in this court in the following-entitled suit in the words and figures following, to wit:

Sup'r Dist. Court, Parish of Orleans. No. 807.

In the Matter of the Board of Administrators Praying for a Recognition of Mortgages and Recovery of Assessments in the 4th Drainage District.

This cause was duly taken up for the purpose of homologating the tableaux of assessments, filed herein, on the twenty-ninth day of January, A. D. 1873, as far as not opposed, viz: By Widow Lesseps, Albin Soulé, Bernard Soulé, heirs of Norbert Soulé and Frank N. Butler, attorney *ad hoc.*

Present: Geo. S. Lacey, attorney for board of administrators, etc.

When after hearing evidence and the arguments of counsel and the law and evidence authorizing the same,

It is hereby ordered, adjudged and decreed, that the assessment-rolls or tableaux aforesaid, embracing the property lying within the fourth drainage district of the city of New Orleans comprised within the following limits, viz: Commencing on the left bank of the River Mississippi at a point of intersection with Lafayette avenue, thence continuing down said river to the point of intersection with Fisherman's canal, thence running back from the said river a distance of 9,900 feet or thereabouts, to Bayou Bienvenu and Florida walk, for a distance — 15,914 feet or thereabouts, so as to connect through a curved line of 338 feet additional with Lafayette and People's avenue-, at a point distant from the Mississippi river of 9,600 feet or thereabouts, and thence along Lafayette avenue to the place of beginning," be and the same is hereby homologated and approved and in addition thereto, judgment is now rendered in favor of the city of New Orleans and the board of administrators of said city jointly and severally for account of the several parties, and for the uses and purposes designated and provided for by law and against the several pieces of property set forth or described in such tableaux or assessment-roll, and the respective owners thereof, known and unknown, for the amount or amounts therein set forth against said property or the owners thereof, together with interest at the rate of six per cent. per annum from the 30th day of January A. D. 1873, and also ten per cent. upon and in addition to the amount above allowed for principal and interest, as fees for the attorney herein named, together with such costs as may have accrued or may hereafter accrue in the prosecution of these proceedings.

And it is further ordered, adjudged and decreed, that the mortgage and lien hereafter declared by an order or judgment of this

court, be and the same is hereby recognized and confirmed;
90 and the city of New Orleans and the board of administrators, for the uses and purposes required by law, and any and all parties having an interest in this judgment, as therein set forth, are hereby declared to have a mortgage and lien on the several pieces of property mentioned and described in the assessment-roll or tableaux, herein referred — and homologated for the payment and satisfaction of this judgment, principal and interest, attorney's commission and costs.

Judgment signed 20th day of March, A. D. 1873.

(Signed) JACOB HAWKINS, *Judge.*

In testimony whereof, I have hereunto set my hand and affixed the seal of the said court at the city of New Orleans, on this 21st day of October, in the year of our Lord, one thousand eight hundred and seventy-four, and the ninety-eighth year of the Independence of the United States.

(Signed) J. J. HANNON, *D'y Clerk.*

Extract from Tableaux.

Endorsed on foregoing judgment.

Bill.	Name owner.	Property.
3048.	City of New Orleans.	All streets from Lafayette avenue to lower parish line, and from the River Mississippi to Florida avenue.

Amount of drainage tax, $65,956.75; 10 per cent., $6,595.75 and interest.

CLERK'S OFFICE, SUPERIOR DISTRICT COURT,
NEW ORLEANS, *October* 21*st*, *A. D.* 1874.

Superior Dist. Court, Parish of Orleans. No. 807.

In the Matter of the Board of Administrators Applying for a Recognition of Mortgages and Payment of Assessments of the Fourth Drainage District.

I hereby certify that in the above-entitled matter, no answer or opposition to the homologation of the tableaux of assessments was filed by the city of New Orleans; that the city of New Orleans prayed for such homologation, and that the judgment of homologation rendered on the 15th day of March, A. D. 1873, and signed on the 20th day of March, A. D. 1873, is final and executory.

In witness whereof I have hereunto affixed my official signature and the seal of the said court at the city of New Orleans, this 21st day of October, A. D. 1874.

(Signed) J. J. HANNON, *D'y Clerk.*

COMPTROLLER'S OFFICE,
NEW ORLEANS, *December* 4, 1886.

I hereby certify the foregoing to be true and correct copies of the

transcript in the above entitled and numbered cause as regis-
91 tered in this office, November 5th, 1874, in Book 2, folios 74 to 87 inclusive.

(Signed) E. S. WILLIAMS,
Legal Process Cl'k.

Endorsed: No. 807. Superior district court. In the matter of the Board — Administrators of the City of New Orleans, etc. *Fourth* draining dist. Copies of petitions praying judgment, decreeing mortgage lien and privilege, and homologating assessment-rolls, with extracts from rolls showing am't of judgment due by city of New Orleans. $65,956.77. Exhibit "E" and "homologation 5."

"*Inventory* 1."

Copy of the inventory of the effects of the Miss. & Mexican Gulf Ship Canal Co. transferred to the city of New Orleans, as on file in the office of the city surveyor. Filed with and made part of bill Nov. 26, 1894.

CITY SURVEYOR'S OFFICE,
ROOM 19, CITY HALL, *May* 1, 1876.

To the hon. mayor and administrators of the city of New Orleans:

In conformity with instructions conveyed in an ordinance recently adopted by the city council, I have made a careful and thorough examination of the property mentioned and represented by W. Van Norden, transferee of the Mississippi and Mexican Gulf Ship Canal Company, and herewith have the honor to submit a report showing the condition and approximate value of the same, together with such other information as I have been directed to furnish under the requirements of said ordinance. The property examined consists of:

7 dredge-boats.
11 derricks.
1 steamtug.
1 barge for floating derricks.
1 floating boarding-house.
1 lot of buildings at Halfway house.
1 assortment of large and small castings, etc., for dredge-boat machinery.

Dredge-boat No. 1.

Dredge-boat No. 1 is now lying in Upper Line protection levee canal, near Carrollton, and has not been provided with work for over five months.

It is 70 feet long and 30 feet wide. The capacity of dipper is 1¼ cubic yards at each lift, and the average capacity for excavating per month is 12,500 cubic yards. The hull is six years old, and shows a little leakiness near foot of iron mast, but is still in serviceable condition, and the engine, boiler and other machinery is in good working order. The boat has an upper deck, with serviceable sleeping and boarding accommodations for a full complement of mechanics and laborers, and all in good order.

92 The machinery of the derrick accompanying this boat is now stored upon the deck of the dredge, the frame having rotted and been abandoned.

The machinery, however, is in good order and would be ready for service as soon as a new frame could be constructed. The original cost of the dredge was $25,000, and the derrick $5,000.

Dredge-boat No. 3.

Dredge-boat is now actively at work in excavating the Lower Line protection levee canal at a point about one mile south and east of its intersection with the Mobile railroad. It is 70 ft. in length and 30 ft. in width. The capacity of dipper is 1¼ cubic yards to the lift and the average capacity for excavating is about 12,500 cubic yards per month. The hull is six years old, with but slight apparent leaks, and has been recently repaired, with a new floor on lower deck. It has an upper deck with suitable sleeping and boarding accommodations for a full complement of mechanics and laborers, and all in good order. This boat has been constantly at work and has suffered no delay except for a short period when difficulties were encountered in crossing the track of the Mobile railroad. The machinery is all in good, and serviceable working order, as well as that of the derrick accompanying it. The original cost of the dredge was $25,000, and the derrick $5,000.

Dredge-boat No. 2.

Dredge-boat No. 2 is now engaged in following boat No. 3 in deepening the Lower Line canal, and is now located near the crossing of the Mobile railroad. The length is 70 ft. and the width 30 ft. The capacity of dipper is 1¼ cubic yards to the lift and average capacity per month 12,500 cubic yards.

The hull is six years old, showing no leaks and in good working condition; it has an upper deck with suitable sleeping and boarding accommodations for a full complement of mechanics and laborers, and all in good order. The boat has been laid up for several months, a portion of the time undergoing repairs, and only recently resumed work in deepening the canal, behing boat No. 3. The entire machinery of the boat, together with that of the accompanying derricks, is in good order and capable of doing effective work. The original cost of the dredge was $25,000 and the derrick $5,000.

Dredge-boat No. 4.

Dredge-boat No. 4 is now lying alongside of boat No. 1, in Upper Line protection levee canal, near Carrollton, and has not been provided with work for more than five month-. It is 70 feet long and 30 feet wide. The capacity of dipper is 1¼ cubic yards and the average capacity for dredging about 12,500 cubic yards per month. The hull is six years old, presents no signs of leaking, and the

whole is in serviceable order. It has an upper deck with
93 suitable sleeping and boarding accommodations for a full complement of mechanics and laborers, and all in good order. The derrick accompanying this boat had a new frame built about eighteen months ago, and the machinery, together with that of the main boat, is in good order and ready for any work to which it may be assigned. The original cost of the dredge was $25,000 and the derrick $5,000.

Dredge-boat J. O. Noyes.

The dredge-boat J. O. Noyes is located at the same point in Upper Line canal with boats Nos. 1 and 4, and has been idle for four months.

It is 62 ft. long and 19 ft. wide. The capacity of dipper is one cubic yard, and average capacity of boat for dredging work about 6,000 cubic yards per month.

The hull is three years old, perfectly sound and free of leaks, and has an upper deck with suitable accommodations for all workmen. The machinery is in good order, and the boat is ready for active service. The original cost of the dredge was $25,000.

Dredge-boat Clam Shell.

The Clam Shell is now lying at the —— Lower Line canal adjacent to the Gentilly Ridge road crossing, and has been idle for several months. It is 65 ft. long and 30 feet wide, the hull is 6 years old, and shows a few leaks, but nothing serious. The boat was constructed under a patent for a new dipper, and other royalty appliances, and is therefore the most costly of all the boats. The dipper resembles a clam shell from which the boat derives its name, and is capable of performing an immense amount of work, in cleaning and deepening old canals, or taking out the border cuttings of a new canal. The capacity of the boat is about 15,000 cubic yards per month, when provided with suitable work or soft digging. The machinery is in good order and condition and the boat ready for active service. It has also an upper deck provided with suitable accommodations for all mechanics and laborers and everything about it in fair condition. The original cost of the boat and outfit was $40,000.

Dredge Called Ridge Boat.

The Ridge boat is now lying in the London Avenue canal, or tail-race near the London Avenue draining machine, and has been idle for four months. It is 83 ft. in length and 30 feet in width. The capacity of dipper is one cubic yard and average capacity for excavating per month 6,000 cubic yards. The boat was purchased from the city by the canal company, and a new hull built about five years ago. It was furnished with a new boiler and water pumps, and the entire machinery and hull is now in good and serviceable working order. It has like all the others an upper deck, etc. The cost of the dredge including the new hull, etc., was $18,000.

94 *Steamtug.*

The steamtug is used as a transport for conveying pieces of machinery and supplies from the central depot at Halfway house to the different boats when required. It is several years old, and when new cost about $2,000. It is in serviceable order.

Barge for Floating Derricks.

The barge for floating derricks is now lying with the boats tied up in the Upper Line canal, and is 60 feet long and 31 feet wide. The hull is in good order, and no leakage visible. The original cost was about $1,000.

Floating Boarding-house.

The floating boarding-house is 28 feet in length and 14 feet wide. It contains a stove, cook-room, store-room, with sleeping berths and dining hall and has a good shingle roof. The hull is in good condition, with no apparent leaks. It cost to build about $500.

Buildings at Halfway House.

These buildings are located on the east bank of the new canal, opposite the Halfway house, and serve as a central depot for the distribution of machinery and supplies and for making repairs. They consist of a frame house used as a store-room and office. One blacksmith shop with tools and appurtenances, a carpenters' shed and outbuildings and cisterns, etc.

The ground upon which they are built was leased from the "Fireman's Charitable Association," but the lease is about expiring and will have to be renewed or the buildings removed. The original cost of improvements was about $1,500.

Assortment of Castings, etc.

This assortment comprises various castings both large and small as duplicates to the different parts of the dredge-boat machinery and they are all stored at the central depot near the Halfway house. Some of the principal pieces are, viz:

1 heavy cast-iron mainmast.
2 " " topmasts.
Hoisting and swinging drums.
Duplicate cog-wheels various sizes. A quantity of small castings representing duplicates for almost every part of the machinery in use. The original cost of this assortment of iron-work was about $5,000.

Valuation.

In estimating the value of the property above enunciated and especially that of the dredge-boats, I have been confronted with grave difficulties in determining exactly how the valuation should be made.

95 A dredge-boat is something which really has no true market value at all times corresponding with its actual cost, therefore, it can only be deemed valuable in proportion to the amount of profitable work it may have the prospect of executing in a fixed period of time. In the hands of the present owner who has by law a specific and valuable contract to execute, or in the contemplated possession and use by the city, the dredge-boats would certainly possess a positive usefulness and consequently have some fixed or definite value. Governed by this view of the case the conclusion has been reached that it would be just and equitable to make a valuation on the basis of the actual or original cost of the property, but with a deduction of 25 per cent. as an offset for wear and tear from use and deterioration by age.

The following result has therefore been attained and is respectfully submitted:

Dredge-boat No. 1, original cost	$25,000
" " 2, " "	25,000
" " 3, " "	25,000
" " 4, " "	25,000
Dredge-boat "J. C. Noyes," original cost	17,000
" "Clam Shell," " "	40,000
Total	$157,000
Dredge-boat Ridge boat, original cost	18,000
Derrick of No. 1, original cost	5,000
" " " 2, " "	5,000
" " " 3, " "	5,000
" " " 4, " "	5,000
Steamtug, original cost	2,000
Floating boarding-house, original cost	500
Buildings at Halfway house, original cost	1,500
Floating barge for derrick, " "	1,000
Various castings, etc., for machinery, original cost	5,000
Making a total of	$205,000
Less 25 per cent	51,250
Leaving a balance for valuation of entire property	$153,750

Damages Claimed.

The damages claimed by the transferee are for delays at various times and places and are enumerated according to the statement as follows, viz:

Delay on lake-shore protection levee (1872) 80,000 cubic yards. Delay in crossing Jackson R. R. (1873) 24,000 cu. yds. Delay in crossing Mobile R. R. (1875) 68,000 cu. yds. dredge-boats idle not supplied with work (1875 and 1876) 190,000 cu. yds. making a total of 362,000 cu. yds.

It is claimed by the transferee that without the delays above

enumerated the boats would have executed and he would
96 have examined on estimate of 352,000 cubic yards in excess of what has been returned from this office, and that the estimate is made in cubic yards for the purpose of determining by an allowance of what the work would have cost, what the probable profits would have been, and consequently the damages sustained. From an examination made of the records in this office and from personal knowledge of the facts of the situation, I am of the opinion that the claim presented is excessive and is susceptible of very considerable deduction. A communication has been found in the letter book under date of Aug. 15th, 1872, from Wm. H. Bell, city surveyor to J. C. Noyes, notifying him by directions of the administrators of improvements, not to commence excavations for lake levee until a certain price of planking and timber work adjacent was completed. It is claimed that this notification delayed the boats which were then ready to commence work and that the delay was equivalent to the performance of 80,000 cubic yards of embankment—but I can find nothing further in the records to show exactly how many days the boats were idle on consequence of this notification, and, therefore, I am not prepared to recognize any specific amount for this claim.

The delay in crossing Jackson railroad may be a just claim, but there are no records in this office showing any negligence or unnecessary action on the part of the city authorities, or of the railroad company in hindering the prosecution of the work, and I am not prepared in this case either to admit or dispute the claim until competent evidence is produced to establish it.

The claim for damages in crossing the Mobile R. R. cannot be justly established, as by a compromise effected between the city, the railroad company and the transferee, the question of damages was adjusted beforehand, and allowances made in drainage warrants to the transferee for that purpose.

The item of 190,000 cubic yards for delays in boats not being supplied with work during the latter months of 1875 and up to the present time of 1876, is subject to certain modifications from statements and explanations hereinafter to be made.

The boats that have been idle up to the 1st May inst. are, viz:

Boat No. 1	5½	months.
" " 4	5½	"
" J. C. Noyes	4	"
" Ridge boat	4	"
" Clam Shell	4	"

Of the above boats the only ones entitled to a consideration for damages are No. "1," "4" and the "Clam Shell." These boats finished the interior work they were engaged upon last November, and were ready to proceed with the excavations for the lake-shore revetment levee, but were prevented from so doing by the refusal of the city authorities to allow the city surveyor to furnish the necessary lines and levels.

The J. O. Noyes was withdrawn from the Nashville Avenue canal

and tied up without the knowledge or consent of this depart-
97 ment, and therefore is entitled to no consideration or damages for her idleness.

The Ridge boat also is entitled to no consideration, as work was provided for it, but not accepted. The only boats therefore for which an assessment for damages can be entertained are No. 1, No. 4 and the Clam Shell; and I have deemed that the most equitable way to arrive at a conclusion is to make an abstract from the records of what these several boats earned in a certain period immediately anterior to being stopped, and accept this as a fair estimate of what they would have earned and been entitled to in cubic yards for the whole period of their delay:

			C. yds.
Boat No. 1,	5½ months, at	12,720 yds. per month	..69,960
" No. 4,	5½ " "	12,350 " "	..67,925
" Clam Shell,	4 " "	2,890 " "	..11,560
Making a total of			149,445 cubic yards

As far as the actual damages are concerned in money, I am not able to arrive at a conclusion and do not feel myself called upon to express an opinion. But with the facts before you and the suggestions which have been made, there will no doubt be sufficient data for the committee to be enabled to arrive at something like a just and satisfactory conclusion in the premises.

Respectfully submitted.

(Signed) THOMAS S. HARDEE,
City Surveyor.

" *Transfer* 1."

Mexican Gulf Ship Canal Co. and W. Van Norden, transferee, to the city of New Orleans.

Filed with and made part of bill Nov. 26, 1894.

N. O., 7th June, 1876. Sale of franchises. No. —. Mis. & Mex. Gulf Ship Canal Co. and W. Van Norden, transferee and individually, to the city of New Orleans.

UNITED STATES OF AMERICA,
State of Louisiana, Parish of Orleans, City of New Orleans.

Be it known, that on this seventh day of the month of June, in the year of our Lord one thousand eight hundred and seventy-six, and of the Independence of the United States of America the one-hundredth, before me, Gustave Le Gardeur, Jr., a notary public, duly commissioned and sworn, in and for the city and parish aforesaid, therein residing, and in the presence of the witnesses hereinafter named and undersigned, personally came and appeared:

1. The Honorable Charles J. Leeds, mayor of the city of New Orleans, and herein duly authorized as such, under, and by virtue of ordinances Nos. 3479 and 3539, administration series, adopted by

the council of the city of New Orleans, respectively, on the
98 25th day of April and 23d day of May, 1876, and herein furthermore fully authorized under and by virtue of the provisions of act No. 16 of acts of 1876, approved February 24, 1876.

2. Messrs. John Mathers, Jr., and Samuel D. Moody, both of this city, and herein acting, the former as president, and the latter as secretary, of the Mississippi & Mexican Gulf Ship Canal Company, a duly authorized corporate body of this State, domiciled in this city, and herein acting in their said capacities, under and by virtue of a resolution of the board of directors of the said Mississippi & Mexican Gulf — Canal Company, adopted at their sitting of the 3d day of June, 1876, a duly certified copy of which said resolution is hereto annexed for reference.

3. And Warner Van Norden, Esquire, also of this city, herein acting in his own name, individually, and also as transferee and pledgee of the said Mississippi & Mexican Gulf Ship Canal Company, under and by virtue of an act passed before Andrew Hero, Jr., a notary public, in this city, on the 22d day of May, 1872.

And the said Mississippi and Mexican Gulf Ship Canal Co. through its president and secretary aforesaid, and the said W. Van Norden, as transferee and pledgee of the said company, by virtue of the aforerecited act of the 22d of May, 1872, before the said A. Hero, Jr., notary, declared that for the consideration and on the terms and conditions herein set forth, they do, by these presents, grant, bargain, sell, convey, transfer, assign and set over, with a full guarantee against all trouble, debts, mortgages, claims, evictions, donations, alienations or other encumbrances whatsoever, unto the said city of New Orleans, the said Charles J. Leeds, as mayor aforesaid, accepting and purchasing for, and in the name of the said city of New Orleans, under and by virtue of the authority in him vested by said ordinances Nos. 3479 and 3539, administration series, duly certified copies whereof are hereto annexed for reference, and also under and by virtue of the rights and powers conferred by said act No. 16 of the acts of 1876, and acknowledging due delivery and possession thereof.

All and singular, the rights, title, interest, share, claim, demand, franchises, privileges, contracts and advantages of every nature and kind whatsoever which the said Mississippi and Mexican Gulf Ship Canal Company, has, or may have, under and by virtue of act No. 30 of the legislature of this State, entitled "An act to provide for the drainage of New Orleans," passed at the session of 1871, and of all other acts of the legislature of this State, and which the said W. Van Norden, as transferee and pledgee aforesaid, has, or may have, under and by virtue of the aforesaid act, passed on the 22d day of May, 1872, before the said Andrew Hero, Jr., notary.

And the said W. Van Norden, in his own name, individually declared that for the consideration and on the terms and conditions hereinafter set forth, he does by these presents grant, bargain, sell, convey, transfer, assign and set over, with a full guarantee against all trouble, debts, mortgages, claims, evictions, donations, alienations

or other encumbrances whatsoever, unto the said city of New
99 Orleans, the said Charles J. Leeds, as mayor aforesaid, accepting and purchasing for and in the name of the said city of New Orleans, under and by virtue of the authority in him vested by said ordinances Nos. 3479 and 3539, administration series, and also under and by virtue of the rights and powers conferred by said act No. 16 of the acts of 1876, and acknowledging due delivery and possession thereof.

All and singular the following-described dredge-boats and derricks, together with the machinery, engine, tackle, apparel and appurtenances, and all other necessaries thereto belonging, together with the hereinafter-mentioned articles and effects, to wit:

Dredge-boat No. 1, 70 feet long and 30 feet wide.

Dredge-boat No. 2, 70 feet long and 30 feet wide.

Dredge-boat No. 3, 70 feet long and 30 feet wide.

Dredge-boat No. 4, 70 feet long and 30 feet wide.

Dredge-boat, styled the J. O. Noyes, 62 feet long and 19 feet wide.

Dredge-boat, styled Clam Shall dredge, 65 feet long and 30 feet wide.

Dredge-boat known as Ridge boat, 83 feet long and 30 feet wide.

Four derricks, accompanying respectively dredge-boats Nos. 1, 2, 3 and 4.

One steamtug, known as the Olive.

One barge of far-floating derricks.

One floating boarding-house.

One lot of buildings at Halfway house.

One lot of large and small castings, including one heavy cast-iron mainmast, two heavy cast-iron topmasts, hoisting and surging drums, duplicate cog wheels and various small castings, etc., the whole more fully set forth in a detailed inventory on file in the office of the city surveyor.

The said Warner Van Norden, in his own name, individually, is the owner of the above-described dredge-boats, derricks and other effects and articles for having acquired the same by purchase from the said Mississippi and Mexican Gulf Ship Canal Company by act passed before the said A. Hero, notary, on the 22d day of November, 1872.

To have and to hold the said rights, title, interest, share, claim, demand, franchises, privileges, contracts and advantages of the said Mississippi and Mexican Gulf Ship Canal Company and of the said W. Van Norden, as transferee and pledgee aforesaid, and the said dredge-boats, derricks and other articles and effects above described, unto the said city of New Orleans forever, by virtue of these presents.

And the said Mississippi and Mexican Gulf Ship Canal Company, through its president and secretary aforesaid, and the said W. Van Norden, as transferee and pledgee aforesaid, and — his own name individually, declare that they, moreover, and by these presents, subrogate the said city of New Orleans, in and to all and singular the rights, actions and remedies to which they are or may be entitled under and by virtue of the aforesaid act No. 30 of 1871, or of all

other acts of the legislature of this State, and under and by virtue of the aforerecited acts passed before the said Andrew Hero,
100 Jr., notary, respectively, and on the 22d day of May and 22d day of November, 1872, hereby authorize the said city of New Orleans to exercise and enjoy the said rights, actions and remedies in the same manner and to the same extent as it, the said Mississippi and Mexican Gulf Ship Canal Company, and he, the said W. Van Norden, as transferee and pledgee and in his own name, individually, might or could have done.

The sale of the said rights, title, interest, share, claim, demand, franchises, privileges, contracts and advantages by the said Mississippi and Mexican Gulf Ship Canal Company, and the said W. Van Norden, as transferee and pledgee aforesaid, and the sale of the said dredge-boats, derricks and other articles and effects by the said W. Van Norden, in his own name, individually, are made and accepted for and in consideration of the price and sum of three hundred thousand ($300,000) dollars, payable in drainage warrants.

And now the said J. Mathers, Jr., and S. D. Moody, in their respective capacity, and the said W. Van Norden, as transferee and pledgee aforesaid, and in his own name, individually, declared that they have covenanted and agreed, and do, by these presents, covenant and agree, that the said sum of three hundred thousand dollars in drainage warrants shall be paid in full to the said W. Van Norden, in consideration of the sales herein made, and also in full settlement of all existing claims for damages which the said Mississippi and Mexican Gulf Ship Canal Company and the said W. Van Norden, as transferee and pledgee aforesaid, and in his own name, individually, ever had, or have now, or may have against the said city of New Orleans. And the said Mississippi and Mexican Gulf Ship Canal Company, through its president and secretary aforesaid, does, moreover, by these presents, fully authorize the said city of New Orleans to pay the said sum of three hundred thousand dollars, in drainage warrants, to the said Warner Van Norden.

And now, to these presents, personally came and appeared the Honorable John G. Brown, administrator of accounts of the city of New Orleans, who, by virtue of the authority in him vested by said ordinance No. 3539, administration series, and of the rights and powers conferred by said act No. 16, of acts of 1876, and with the consent of the said Mississippi and Mexican Gulf Ship Canal Company, as is hereby declared and acknowledged by the said J. Mathers, Jr., and S. D. Moody, in their respective capacity, and for and in the name of the said company, has presently in the presence of the notary and witnesses undersigned, handed over and delivered the said sum of three hundred thousand dollars ($300,000) in drainage warrants to the said Warner Van Norden, who as transferee and pledgee aforesaid, and in his own name, individually, and with the full and entire consent of the said Mississippi and Mexican Gulf Ship Canal Company, as is hereby declared and acknowledged by the said J. Mathers, Jr., and S. D. Moody, in their respective capacity, and for and in the name of the said company hereby acknowledging receipt of the same.

101 And for the purpose of providing for the payment of the warrants issued under and by virtue of these presents, and of all other drainage warrants heretofore issued and outstanding, the said city of New Orleans, through its mayor aforesaid, the said Mississippi and Mexican Gulf Ship Canal Company, through its president and secretary aforesaid, and the said Warner Van Norden, as transferee and pledgee aforesaid, and in his own name, individually, do, by these presents, covenant and agree that the existing rights and powers of the holders of drainage warrants, under the civil acts of the legislature of this State relative to drainage and drainage assessments, shall remain unimpaired, and that the drainage tax and assessment shall be administered, collected and paid in the manner and under the terms and conditions following, to wit:

The bureau of drainage collections shall be organized in an office at the city, as follows, to wit:

A book-keeper, who shall be appointed by the city council, and who shall keep such books and records, make such reports, and perform such duties as may be required by the administrators of finance and accounts. His salary shall not exceed two hundred dollars per month. Said officer shall not in any manner obstruct or delay the business of the office. He shall be removable by the council, upon the complaint of the collector, hereinafter provided for, for cause.

If desired by the said W. Van Norden, a duplicate set of books shall be made and placed subject to the use of the said collector.

Until the drainage warrants issue- by virtue of these presents, in conformity with said ordinance No. 3529, administration series, and all other drainage warrants, heretofore issued and now outstanding, shall be liquidated and paid, the collection of drainage assessments, shall be assigned to an officer, who shall be selected by the said W. Van Norden, and be confirmed by the city council. Said officer shall give bond with a good and solvent security in the sum of twenty-five thousand ($25,000) dollars for the prompt and faithful execution of the duties and powers provided by law for the collection of drainage assessments and the prompt and efficient collection of the same in accordance with law; and the business of his office shall be subject to the supervision of the administrators of finance and accounts. He shall receive a compensation in lieu of expenses of all kinds, including books, bills, stationery, legal services, costs of court or clerk's hire of three hundred ($300) dollars per month and 2½ per cent. commission on collection of drainage assessments, and shall make such monthly reports as may be required by the administrators of finance and accounts. Said collector shall be continued in office until the liquidation of the said drainage warrants issued by virtue of these presents or heretofore issued and now outstanding; and in case of death or resignation a successor shall be chosen as above provided for.

No receipt of the said collector for drainage assessment shall be valid unless countersigned by the administrator of finance.

The city council shall have the right to remove the said
102 collector for good and sufficient cause, and a successor shall be appointed as hereinabove provided.

All expenses, fees and charges incurred in the collection of drainage assessment shall be paid out of the drainage fund.

All suits and judicial process and writs relating to — appertaining to drainage assessments and taxes shall be and continue as heretofore controlled by the city council, and be conducted by the city attorney, but all writs of "*fieri facias*" to be issued as required by law and the judgments of the courts.

All parties owing drainage assessments shall have the right to pay the same in drainage warrants, at their face value and interest thereon, and the said collector and administrators of finance shall receive the same in satisfaction of all drainage assessments.

All parties owing drainage assessments in the fourth drainage district shall be entitled, upon the prompt payment of the four-tenths of the whole assessments, to an extension of time for the payment of the remaining six instalments; the said six instalments shall be paid yearly as prescribed by an ordinance already adopted by the city council.

And now the said Chas. J. Leeds, hereby promises for and binds and obligates the city of New Orleans, after the date of these presents, to issue no drainage warrants other than those issued by virtue of these presents, in conformity with said ordinance No. 3539, administration series, and such other drainage warrants as may now be issued and outstanding until said warrants have been fully liquidated and paid, and not to obstruct or impede, but, on the contrary, to facilitate, by all lawful means, the collection of the drainage assessments as provided by law until said warrants have been fully paid, it being well understood and agreed by and between the said parties hereto that collections of drainage assessments shall not be diverted from the liquidation of said warrants and expenses as hereinabove provided for, under any pretext whatsoever until the full and final payment of the same; and it is moreover well understood and agreed by and between the said parties hereto, that all work heretofore done by said Wm. Van Norden, not certified shall be measured by the city surveyor, and the same shall be paid for in drainage warrants in the usual form, and that inasmuch as it has been claimed that certain collections of drainage funds have been applied by the previous administrators to general fund purposes, the said city of New Orleans will issue to the said W. Van Norden the sum of twenty thousand dollars ($20,000) in drainage warrants in full satisfaction of the same.

And now by virtue of the foregoing, the said Mississippi and Mexican Gulf Ship Canal Company, through its president and secretary aforesaid, and the said Warner Van Norden as transferee and pledgee aforesaid, and in his own name, individually, declared that they do, by these presents, remise, release and forever discharge the said city of New Orleans from and against any and all claims and demands of every nature and kind whatsoever which they ever had or have now or may have against the said city of New Orleans.

103 And now it is moreover well understood, covenanted and agreed that the said Mississippi and Mexican Gulf Ship Canal

Company and the said Warner Van Norden, individually, and as transferee and pledgee aforesaid, shall and will, at all times, protect the said city of New Orleans, against and save it harmless from any and all claims and demands of every nature and kind whatsoever which may have been, can now be or may hereafter be set up against the said city of New Orleans, or against them or either of them in reference to drainage work, arising out of their connection with the drainage of the city, or in any manner pertaining or relating to their acts, rights, franchises and privileges under said act No. 30 of 1871, or in reference to the said dredge-boats, derricks and other articles and effects, provided, however, that the guarantee herein set forth shall not be considered as extending any further than to warrant the city of New Orleans in the title to the boats and property herein transferred to it by said W. Van Norden, and to save and indemnify the said city of New Orleans from any loss, injury or damage arising from the acts and conduct of the said Mississippi and Mexican Gulf Ship Canal Company or the said Warner Van Norden in reference to, or arising from their connection with the drainage work herein referred to.

Thus done and passed in New Orleans, at my office, the day, month and year first above written, in the presence of Armand Pitot, Jr., and Gustave M. Letellier, competent witnesses, who have signed these presents with the said parties and me, notary, after reading the whole.

(Original signed) CHAS. J. LEEDS, *Mayor.*
J. MATHERS, *President.*
S. D. MOODY, *Secretary.*
J. G. BROWN,
Adm'r Pub. Acc't.
W. VAN NORDEN.
A. PITOT, JR.
G. M. LETELLIER.
G. LE GARDEUR, *Not. Pub.*

Registered in Conveyance Book 108, folio 484.
New Orleans, June 7, 1876.
[SEAL.] (Signed) C. B. FISH, *Registrar.*

A true copy of the original on and of record in my office.
New Orleans, June 9, 1876.
G. LE GARDEUR, *Not. Pub.*

104 *Ordinance No. 3479, A. S., for Appraisement of Property.*

Filed with and made part of bill Nov. 26, 1894.

MAYORALTY OF NEW ORLEANS,
CITY HALL, *April* 26, 1876.

(No. 3479, administration series.)

Be it ordained, That in accordance with the provisions of act No. 16, approved February 24, 1876, Thomas S. Hardee, city surveyor, be and he is hereby authorized and instructed to make a thorough examination of the condition and value of all the dredge-boats, machinery, tools and appurtenances belonging to the Mississippi and Mexican Gulf Ship Canal Company, or transferee, and used for the excavating of canals or building protection levees, making a report to the committee of the whole, together with a statement of all information in the possession of his office, concerning damages claimed by the said Mississippi and Mexican Gulf Ship Canal Company, or transferee thereof.

Adopted by the council of the city of New Orleans, April 25, 1876.

CHARLES J. LEEDS, *Mayor.*

Ordinance No. 3539, A. S.

Filed with and made part of bill November 26, 1894.

MAYORALTY OF NEW ORLEANS,
CITY HALL, *May* 26, 1876.

(No. 3539, administration series.)

Be it ordained, That the mayor be and he is hereby authorized and instructed to enter into notarial agreement with the Mississippi and Mexican Gulf Ship Canal Company, or transferee, for the purchase of all dredge-boats, derricks, parts of machinery and property of every description belonging to the Mississippi and Mexican Gulf Ship Canal Company, or transferee, and used for the excavation of drainage canals or construction of protection levees, as per inventory of the city surveyor, also for the full settlement of all claims for damages and to secure the absolute sale, relinquishment and transfer to the city of New Orleans of all rights, privileges and franchises created, authorized or arising in favor of the Mississippi and Mexican Gulf Ship Canal Company and transferee, under and by virtue of act No. 30 of 1871, or under and by virtue of all other acts of the legislature of the State of Louisiana, or ordinances of the city of New Orleans, and embodying the terms agreed upon between W. Van Norden and the committee of the whole.

Be it ordained, That upon the execution of the aforesaid notarial

agreement, the administrator of accounts be, and he is hereby
105 authorized and directed to warrant upon the administrator of finance for the sum of $300,000, in drainage warrants, in full settlement, as above provided.

Adopted by the council of the city of New Orleans, May 23, 1876.

Yeas—Bertoli, Brown, Bouny, Burke, Landry, McCarthy, Pilsbury.

CHARLES J. LEEDS, *Mayor.*

Agreement between Warner Van Norden and Mississippi and Mexican Gulf Ship Canal Co.

Filed with and made part of bill Nov. 26, 1894.

STATE OF LOUISIANA,
Parish and City of New Orleans.

Be it known that on this twenty-second day of May, in the year of our Lord one thousand eight hundred and seventy-two, and of the Independence of the United States of America the ninety-sixth, before me, Andrew Hero, Jr., a notary public, in and for the parish and city of New Orleans, State of Louisiana, duly commissioned and qualified, and in the presence of the witnesses hereinafter named and undersigned, personally came and appeared—

Lafayette Folger, president of the Mississippi and Mexican Gulf Ship Canal Company, a duly organized corporate body of this city and State, domiciled in this city and herein acting in his capacity as president thereof, under and by virtue of a resolution of the board of directors thereof passed at their meeting held on the twenty-first inst., a duly certified copy of which said resolution is hereto annexed for reference.

Which said Lafayette Folger, declared that whereas, the work done by said Mississippi and Mexican Gulf Ship Canal Company, under the provisions of act No. 30 of the legislature of this State of the session of 1871, entitled An act to provide for the drainage of New Orleans is and has been always paid for in warrants, as provided for by sec. 8 of the aforesaid act, owing to the want of funds in the city treasury therefor, which said warrants are only convertible in cash at a discount of twenty-five per cent. and more. And whereas, the expenditures of said company in constructing and executing the work provided for in said act are and have to be paid in cash, and it has been deemed judicious by the board of directors of said company to make some arrangement by which the necessary cash can be obtained.

And whereas, Warner Van Norden, of this city, has agreed to advance and furnish the said Mississippi and Mexican Gulf Ship Canal Company during the ensuing twelve months the sum of one hundred and fifty thousand dollars, to meet and discharge the expenses in doing said work upon the condition that he, said Van Norden, shall be paid and reimbursed all sums of money that may

be so advanced out of the warrants, money or other revenues
106 which may be obtained from the city of New Orleans under the provisions of the aforesaid act No. 30 of the legislature of this State, and also that said sum of one hundred and fifty thousand dollars shall be given in such instalments as may be deemed necessary, as the work progresses, upon the notes or obligations of said company.

Now, therefore, in consideration of the premises, and in order to secure the payment and reimbursement of said loan of one hundred and fifty thousand dollars (together with all interest thereon) that may be furnished and advanced by said Warner Van Norden in the premises, said Lafayette Folger, moreover declared in his said capacity of president and for and on behalf of said Mississippi and *and* Mexican Gulf Ship Canal Company, that he does by these presents transfers, assign and set over unto the said Warner Van Orden, here present, accepting for himself, his heirs and assigns all and singular the right, title, interest, claim and demands of said Mississippi and Mexican Gulf Ship Canal Company in and to the privileges and advantages granted to it under the aforesaid act No. 30 of the legislature of this State entitled "An act to provide for the drainage of New Orleans," as well as in and to all sums of money, profits and benefits that may ensue or be realized by virtue of the performances and execution of the work therein provided for. And said Lafayette Folger in his aforesaid capacity moreover transfers and assigns unto said Warner Van Norden, any and all certificates, cash, warrants or bills that may be made out and delivered by the surveyer, administrator of public accounts or other officers of the city of New Orleans for any and all work done or performed by said company under the provisions of said act, hereby authorizing and empowering said Van Norden to demand and receive all such money, warrants or bills from said surveyor, administrator of public accounts or other officers and to collect and receive the amount *or* thereof.

Thus done and passed, in my office, at New Orleans aforesaid, in the presence of Paul A. Conaud and George Cenas both of this city, who hereunto sign their names with the parties and me, the said notary, the day and date aforesaid.

(Original signed) LAFAYETTE FOLGER,
President M. & M. G. Ship Canal Co.
W. VAN NORDEN.
ANDREW HERO, JR., *Not. Pub.*

GEO. CENAS.
P. A. CONAND.

A true copy of the original on file in my office.
New Orleans, April 5th, A. D. 1893.

[SEAL.] (Signed) ANDREW HERO, *Not. Pub.*

107 *Sale of Dredge-boats by Mississippi and Mexican Gulf Ship Canal Co. by W. Van Norden.*

Filed with and made part of bill Nov'r 26, 1894.

STATE OF LOUISIANA,
Parish and City of New Orleans.

Be it known that on this twenty-second day of November in the year of our Lord one thousand eight hundred and seventy-two and of the Independence of the United States of America, the ninety-seventh, before me, Andrew Hero, Jr., a notary public in and for the parish and city of New Orleans, State of Louisiana, duly commissioned and qualified, and in the presence of the witnesses hereinafter named and undersigned, personally came and appeared—

Lafayette Folger, the president and Samuel D. Moody, the secretary of the Mississippi and Mexican Gulf Ship Canal Company, a duly organized corporate body of this State, domiciled in this city, and herein acting in the said capacities and for and on behalf of said Mississippi and Mexican Gulf Ship Canal Company, under and by virtue of a resolution of the board of directors thereof, passed at their meeting held on this day; a duly certified copy of which said resolution is hereto annexed for reference.

Which said Messrs. Folger and Moody declared, in their said capacities and for and on behalf of said Mississippi and Mexican Gulf Ship Canal Company, that for the consideration and on the terms and conditions hereinafter expressed, they do by these presents grant, bargain, sell, convey, transfer, assign and set over, with all legal warranties, unto—

Warner Van Norden, also of this city, here present accepting and purchasing for himself, his heirs and assigns, and acknowledging delivery and possession thereof—

All and singular the following-described dredge-boats and derricks, together with their machinery, engines, tackle, apparel and appurtenances, and all other necessaries thereto belonging together with the hereinafter mentioned and described articles of personal property, viz:

Dredge-boat No. 1, with steam derrick, now lying and being and used and employed in the drainage canal of this city known and designated as the Upper Line canal.

Dredge-boat No. 2, with steam derrick, now lying and being and employed in the drainage canal of this city, known and designated as the Orleans Street drainage canal.

Dredge-boat No. 3, with steam derrick, now lying and being or used and employed in the draining canal of this city known and designated as the Hagan Avenue canal, and near the Poydras Street draining canal.

Dredge-boat No. 4, with steam derrick, now lying and being at or near the lake end of the new canal, and used or employed in the construction of the lake protection levee.

108 Dredge-boat, known as the Ridge boat, which was purchased from the city of New Orleans, now lying and being or used or employed in the draining canal of this city, known and designated as the Upper Line canal.

Dredge-boat, styled the "J. O. Noyes," now lying and being or used or employed in the draining canal of this city, known as the Carrollton Avenue canal, and near the Poydras Street draining canal.

Dredge-boat styled "Clam Shell dredge," now lying and being or used and employed in the draining canal of this city known and designated as the Upper Line canal.

One barge in said Upper Line canal attached to and working with the aforesaid derrick and dredge-boat No. 1.

Three flat-boats, five skiffs, ten mules, two horses, one wagon, two drays.

The steamtug "Olive" of the burthen of eight tons or thereabouts now lying at the lake end.

Blacksmith shops and carpenter shops of said company with all tools and fixtures thereof.

And all duplicate pieces of machinery.

To have and to hold the aforesaid dredge-boats, derricks and articles of personal property unto the said Warner Van Norden, his heirs and assigns forever.

And said Messrs. Folger and Moody in their said capacities hereby bind and obligate said Mississippi and Mexican Gulf Ship Canal Company and its assigns to warrant and forever defend the dredge-boats, derricks and articles of personal property herein conveyed against all legal claims and demands whatever.

This sale is made and accepted for and in consideration of the price and sum of fifty thousand dollars, which has been settled in the manner following, viz: Whereas the said Mississippi and Mexican Gulf Ship Canal Company is justly and truly indebted unto said Warner Van Norden in the full sum of one hundred and sixty-one thousand nine hundred and sixty-two dollars and eighty-six cents, amount of monies heretofore advanced and furnished by him to the said company, to enable it to do and perform the work provided for under act No. 30 of the legislature of this State for the year 1871. Now therefore in full settlement and liquidation of said purchase price, the said Warner Van Norden hereby gives and grants the said Mississippi and Mexican Gulf Ship Canal Company an acquittance and discharge to the extent and amount of fifty thousand dollars on account of its said indebtedness, reserving in full force and effect all his claims, rights and privileges for the balance remaining unpaid of said indebtedness, with which said partial release said Messrs. Folger and Moody declare the said Mississippi and Mexican Gulf Ship Canal Company to be satisfied, contented and paid, and in their said capacities hereby grant said Van Norden a full acquittance and discharge in the premises.

Thus done and passed, in my office, at New Orleans aforesaid, in the presence of George Cenas and Paul A. Conand, witnesses,

109 both of this city, who hereunto sign their names with the parties and me, the said notary, the day and date aforesaid.

(Original signed) L. FOLGER, *President.*
S. D. MOODY, *Secretary.*
W. VAN NORDEN.
ANDREW HERO, JR., *Not. Pub.*

P. A. CONAND.
GEO. CENAS.

A true copy of the original on file in my office.
New Orleans, November 28th, 1888.

[SEAL.] (Signed) ANDREW HERO, JR., *Not. Pub.*

Copy of Drainage Warrant.

Filed with and made part of bill Nov'r 26, 1894.

(Copy.)

No. 379. DEPARTMENT OF PUBLIC ACCOUNTS,
$2,000.00. NEW ORLEANS, *June* 6, 1876.

To the administrator of finance, city of New Orleans:

Ord. 3539, A. S.

Pay to the order of W. Van Norden, transferee of the Mississippi and Mexican Gulf Ship Canal Company, two thousand dollars out of any funds in the city treasury to the credit of said company.

Drainage warrant.

This warrant is issued in accordance with the provision of act 30 of the session of the General Assembly of the State of Louisiana, held in the year 1871, and the administrator of finance, on presentation to him of this warrant, will pay the same in cash, in case there be any funds in the city treasury to the credit of the said Mississippi and Mexican Gulf Ship Canal Company; but should there not be sufficient funds to cash this warrant then the administrator of finance is required to endorse upon the same the date of its presentation, and this warrant shall bear interest at the rate of eight per cent. per annum from and after the date of such presentation and endorsement until paid.

Charge Mississip-i and Mexican Gulf Ship Canal Company.

(Signed) J. G. BROWN,
Administrator of Accounts.

Presented for payment June 6th, 1876.
(Signed) E. PILSBURY,
Administrator of Finance.

Endorsed: W. Van Norden, transferee.

110 *Ordinance* 2460, *A. S., Authorizing Receipt of Drainage Warrants in Payment of Drainage Taxes.*

Filed with and made part of bill November 26, 1894.

MAYORALTY OF NEW ORLEANS,
CITY HALL, *December* 31, 1873.

(No. 2460, administration series.)

An Ordinance Authorizing the Receipt of Drainage Warrants in Payment of Drainage Taxes.

Be it ordained, That from and after the passage of this ordinance all drainage warrants heretofore or hereafter issued by the administrator of public accounts, under act No. 30, of the legislature of 1871, with the accrued interest thereon, shall be receivable by the administration of finance in payment of drainage taxes; and in order to facilitate the payment of said taxes, the administrator of public accounts shall, on the application of any holder of a drainage warrant of larger amount than the drainage tax which is to be paid, divide said warrant into suitable sums.

Adopted by the council of the city of New Orleans, December 30, 1873.

Yeas—Brewster, Calhoun, Fitzenreiter, Lewis, Schneider, Sturcken, Turnbull.

LOUIS A. WILTZ, *Mayor.*

A true copy:
DANIEL SCULLY, *Secretary.*

Assessment No. "1."

Filed with and made part of bill November 26, 1894.

Commissioners' office, first draining district.

NEW ORLEANS, *Sept'r* 13, 1861.

The board met at 5 p. m., Mr. N. E. Baily in the chair.

Present: Messrs. Baily, Slawson, and Richards.

The minutes of the last meeting were read and adopted.

The following resolutions were offered and passed, viz:

No. 22. *Resolved*, That bonds having (20) twenty years to run be issued to the amount of three hundred and fifty thousand (350,000) dollars and bearing interest at the rate of six (6) per cent. per annum.

No. 23. *Resolved*, That an assessment of three mills and three-tenths be levied upon each superficial or square foot of the lands situated within the limits of the first draining district, one-tenth of said amount to be collected within the ensuing twelve months.

The board adjourned at 9 p. m.

111 "*Assessment No. 2.*"

Filed with and made part of bill, November 26, 1894.

2ND DRAINING DISTRICT,
NEW ORLEANS, *March 11th*, 1861.

Regular monthly meeting.

Present: Messrs. L. H. Place, president; Messrs. Lavillebeyvre, Muncaster, and Godwin, com'rs.

On motion it was

Resolved, That an assessment of two mills per superficial square foot on all the lands lying within the limits of the second draining district be levied in order to pay the principal and interest of the bonds authorized by act of legislature, to be issued by the board for the purpose of defraying the costs of drainage, and that one-tenth part thereof shall be collected yearly.

The first instalment shall be payable during all the month of June, the present year, and the subsequent instalments shall be payable in each year between the 1st day of April and the 1st day of June.

(Signed) AUG. S. PETERS, *Sec.*

"*Assessment No. 3.*"

Filed with and made part of bill November 26, 1894.

Ordinance No. 1569, administration series.

MAYORALTY OF NEW ORLEANS,
CITY HALL, *June 11th*, 1872.

No. 1569, administration series.

An Ordinance Making an Assessment upon Lands of the Third Draining District.

SECTION 1. Be it ordained by the council of the city of New Orleans, That an assessment of two mills per superficial foot in accordance with the authorization and direction of the statutes of the State be, and is hereby, made upon all the lands comprised within the third draining district created and defined by the act of the General Assembly of the State of Louisiana, entitled "An act to provide for leveeing, draining, and reclaiming swamp lands in certain portions of the parishes of Orleans and Jefferson," approved March 18th, 1858, and that the assessment-roll prepared by the department of public accounts of the city of New Orleans containing a description of the landed properties embraced in said district, with the names of the owners thereof, so far as known, and all the requisites required by law, herewith submitted to the council, be, and is hereby, adopted as the assessment made upon land upon each portion thereof described in said roll and against the owners thereof respectively.

SEC. 2. Be it further ordained, etc., That this ordinance shall take effect from its passage.

112 Adopted by the council of the city of New Orleans, June 11, 1872.

(Signed) BENJ. F. FLANDERS, *Mayor.*

Yeas—Cockrem, Shaw, Delassize, Remick, Lewis, Walton, Bonzano.

"*Assessment* 4."

Filed with and made part of bill November 26, 1894.

Ordinance 1877, *New Orleans, Nov'r* 20, 1872, *Making an Assessment on Lands of the Fourth Draining District.*

SECTION 1. Be it ordained by the council of the city of New Orleans, That an assessment of (2) two mills per superficial foot, in accordance with the authorization and direction of the statutes of the State, be, and is hereby, made upon all the land comprised within the fourth drainage district, created and defined by the act of the General Assembly of the State of Louisiana, entitled "An act to provide for leveeing, draining, and reclaiming swamp lands in certain portions of the parishes of Orleans and Jefferson," and approved March 18th, 1858, and subsequent act No. 30 of the legislature of 1871, of Febr'y 24, both or either of said statutes; that the assessment-roll prepared by the department of public accounts of the city of New Orleans containing a description of the landed properties embraced in said district, with the names of the owners thereof, so far as known and all requisites required by law, herewith submitted to the council, be, and is hereby, adopted as the assessment made upon said land and upon each portion thereof described in said roll and against the owners respectively.

SECTION 2. That this ordinance shall take effect from its passage.

(Signed) BENJ. F. FLANDERS, *Mayor.*

Adopted November 19, 1872.

Yeas—Cockrem, Shaw, Dellassize, Remick, Lewis, Walton, Bonzano.

Assignment and Transfer by W. Van Norden to John G. Warner.

Filed with and made part of bill November 26, 1894.

Whereas on the seventh day of June, 1876, I sold to the city of New Orleans, all the dredge-boats and other property and franchise of the Mississippi and Mexican Gulf Ship Canal Company, belonging to me as transferee thereof, as will more fully appear by reference to an act of sale passed before Gustave Legardeur, Jr., notary public, on the seventh day of June, 1876, which is made part hereof, for $320,000 in drainage warrants, which warrants I have since parted with for valuable considerations, and whereas I believed at the time of parting with the same, and intended to transfer to each subsequent holder of said drainage warrants, each, any, and all the

113 rights which might, could, or did at any time enure to me as vendor of said property, as well as each, any, and all rights which might accrue in my favor out of said act of sale, or the conduct of the city of New Orleans under said act of sale, or the violation of any of its duties thereunder since the date thereof, or by reason of any act of omission or commission that said city may have been guilty of since said date, or that has or might have accrued in any other manner:

Now, in consideration of the premises, and for other good and valuable consideration, I hereby assign, transfer, and set over, with full subrogation, to John G. Warner of the city of Brooklyn and State of New York as a holder of said drainage warrants, for himself, and each and every holder of said warrants or any of them, or of drainage warrants issued and delivered for drainage-work done under act No. 30 of the legislature of Louisiana of the year 1871, who may bring suit through him, by Richard De Gray as his attorney and counsellor at law, or solicitor in chancery, each, any, and all actions and right or rights of action, that I may at any time have had or now have against said city of New Orleans, growing out of said sale, or the conduct of said city of New Orleans since said sale, and especially all actions and rights of action, either in law or in equity, which have at any time arisen in my favor by reason of said city of New Orleans violating any of her duties under said act of sale entered into between myself as transferee aforesaid and said city of New Orleans pursuant to act No. 16 of the legislature of the State of Louisiana of the year 1876, approved on the 24th day of February, 1876, the purpose of this assignment being, to place the holders of said drainage warrants, or any of them, through the said John G. Warner and his said attorney, counsellor, and solicitor above named in my place and stead, and entitle them and each of them, to any and all the rights that I ever may have had or now have, in, to, or under said warrants, or under said act of sale, or either of them or in any other manner, against said city of New Orleans, or any other party or parties whomsoever.

(Signed) W. VAN NORDEN. [L. S.]

Signed, sealed and delivered in presence of the undersigned, on the 20th October, 1894.

(Signed) RICHARD DE GRAY.
(Signed) RUFUS K. McHAIG.

STATE OF NEW YORK,
City and County of New York, } ss:

Be it known that on this 20th day of October, A. D. 1894, before me the subscriber, a commissioner of deeds for the State of Louisiana, residing in the city, county and State of New York, came Warner Van Norden, a resident of said city to me known as the party who executed the foregoing instrument, which he signed in my presence

and the presence of Richard De Gray, the same being a com-
114 petent witness and the said Warner Van Norden acknowledged that he signed, executed and delivered the same as his free act and deed for the uses and purposes therein expressed.

[SEAL.] (Signed) RUFUS McHAIG,
A Commissioner for the State of Louisiana,
137 *Broadway, New York.*

Pleadings in the Case of John Crossley & Sons, Limited, vs. City of New Orleans.

No. 9384 of the Docket of the U. S. Circuit Court. Petition — $436,782.55 and Interest. Filed April 18, 1881.

To the honorable the judges of the United States circuit court, holding sessions in and for the fifth circuit, eastern district of Louisiana:

The petition of "John Crossley & Sons, Limited," a commercial concern, established by articles of association, bearing date November 18, 1864, under the joint stock company act of England, passed in the year 1862, having its domicile, or principal place of business at Halifax, England, and the said company, and all of its stockholders being aliens to the United States, respectfully represents:

That the city of New Orleans, a municipal corporation chartered by the laws of the State of Louisiana, and a citizen thereof, located in the parish of Orleans, in said State, is justly and truly indebted unto your petitioners in the sum of four hundred and thirty-six thousand, seven hundred and eighty-two $\frac{55}{100}$ dollars, with interest as hereinafter claimed for this, to wit:

That in the year 1871, the State of Louisiana, with a view to provide for the drainage of the aforesaid city of New Orleans, duly made and passed a certain act, known and designated as act No. 30, of the sessions of the General Assembly of said State for the year 1871; as will more fully and at large, appear from the said act, published in the Session Laws, for the year aforesaid, page 75, *et seq.*, and to which, for greater certainty, your petitioners respectfully refer your honors.

Further they show, that in and by the act aforesaid, the character and extent of the work were prescribed; the measurement of such contemplated work, the way and means of raising funds for the payment thereof, and the manner of making payment were duly provided for; and the Mississippi and Mexican Gulf Ship Canal Company, was authorized and empowered to commence, construct and complete the work aforesaid, on accordance with the enactment and provisions of the aforesaid statute, No. 30.

And your petitioners further show unto your honors that section 8 of the act aforesaid, reads as follows:

"That at the end of every month, it shall be the duty of the city surveyor of New Orleans, or an engineer appointed by the board of administrators for that purpose to examine the work done by the said Mississippi and Mexican Gulf Ship Canal Company, during

said month and upon the measurement of the width and depth of the canal, canals or parts of canals dug, and protection levees
115 built, certify as to the number of cubic yards excavated, and the number of cubic yards of protection levees built during the said month. It shall be the duty of the administrator of accounts, on the presentation to him of the certificate of the city surveyor or engineer appointed by the board of administrators, by the president of the said Mississippi and Mexican Gulf Ship Canal Company, to draw a warrant or warrants on the administrator of finance in payment of the work so done, at the rate of 50 cents per cubic yard of excavation, and 50 cents per cubic yard for the protection levee, the said warrants to be of such denomination as may be required by the president of said company. These warrants it shall be the duty of the administrator of finance to pay on presentation to him, in case there be any funds in the city treasury to the credit of the said Mississippi and Mexican Gulf Ship Canal Company; but should there not be sufficient funds to cash the said warrant or warrants, then the administrator of finance is hereby required to enforce upon the same the date of presentation, after which date the said warrant or warrants shall bear interest at the rate of 8 per cent. per annum until paid, which condition shall be set forth in the form of said warrant or warrants."

Further they show, that a large number of drainage warrants, particularly designated and referred to in the accompanying exhibit, marked A, amounting to $214,208.80, were issued under, and in strict conformity to, the provisions of the aforesaid section of act No. 30, of the year 1871; and that the same are now owned by, and are in the actual possession of, your petitioners, as pledgees of the Louisiana Saving Bank and Safe Deposit Company—having been acquired by petitioners, in due course of business, for a valid consideration, and in good faith—as your petitioners will show upon the trial of this cause.

That certain other drainage warrants, particularly designated and referred to in the accompanying Exhibit B, amounting, in the aggregate, to $520,573.75—were issued under, and in strict conformity to, the provisions of the aforesaid sec. 8 of act 30, of the year 1871; and that the warrants last aforesaid are now owned by, and are in the actual possession of, your petitioners—they having acquired the same, in due course of business, for a valid consideration, and in good faith.

And your petitioners further show unto your honors that in the year 1876 an act was passed by the General Assembly of the State of Louisiana, and approved by the governor of that State, February 24, 1876, authorizing the city of New Orleans, to assume exclusive control of all drainage work, theretofore agreed to be done and performed by the Mississippi and Mexican Gulf Ship Canal Company, in the drainage district of the said city of New Orleans, and to purchase from the aforesaid company, and its transferee Warner Van Norden, all the rights, franchises, and privileges created by act No. 30, of 1871, and all tools, implements, machines, boats and apparatus, belonging to the said company, or its aforesaid transferee, and by

it, or him, used for, or pertaining to, drainage work authorized to be done by the aforesaid act No. 30: As will more fully and at 116 large appear from the said statute, known and designated as act No. 16, of the sessions of the General Assembly of the State of Louisiana, for the year 1876, published in the Session Laws of that year pages 35 and 36, and to which, for greater certainty, your honors are respectfully referred.

That, in and by the act last aforesaid, the city of New Orleans, in consideration of such sale and conveyance to her, was authorized and required to issue her certain warrants, drawn by the administrator of public accounts of the said city, upon the administrator of finance of the city of New Orleans; and which said warrants were to be made payable to the Mississippi and Mexican Gulf Ship Canal Company, or Warner Van Norden, transferee, and to his order.

Further, your petitioners show unto your honors, that on the 7th day of June, A. D. 1876, the aforesaid company, and its said transferee, by an authentic act, duly made and executed before G. Le Gardeur, notary public of the parish of Orleans, sold, assigned, transferred and conveyed to the city of New Orleans, in her own right, all and singular the rights, privileges, and franchises acquired by them, under the aforesaid act No. 30; also certain dredge-boats and derricks, together with the machinery, engines, tackle, apparel and appurtenances, and finally, certain other property, articles and effects; and that in consideration of such sale to the city of New Orleans, the said corporation issued to the aforesaid company, or its transferee, certain warrants drawn by the administrator of accounts of said city, recognized and endorsed by the administrator of finance thereof, to the extent of $300,000.00, bearing interest, as will more fully and at large appear from the authentic act aforesaid, and to which for greater certainty your petitioners respectfully refer the courts.

And furthermore they show that they are the owners, and in the actual possession of a certain portion of the warrants hereinabove last referred to, amounting in the aggregate to the sum of $120,000 having acquired the same in due course of business, for an adequate consideration, and in good faith; that the warrants last aforesaid are particularly designated in Exhibits C, hereunto annexed and made a part hereof; and your petitioners, for greater certainty, respectfully refer your honors to the same, and to the warrants therein listed.

That your petitioners also hold and own certain other drainage warrants, amounting to $50,000.00 or thereabouts at the same time, and acquired by petitioners under the same circumstances as the warrants aforesaid, for $120,000.00; that your petitioners are unable at the present time to designate the warrants for $50,000.00, or thereabouts by numbers or amounts; but that if required so to do by the said defendants, petitioners will, hereafter, file an exhibit, fully disclosing such identity.

That upon the execution of the authentic act aforesaid, the city of New Orleans took into her possession, and has converted to her own exclusive use and benefit all the property and effects, and the thing-

transferred and conveyed to her as aforesaid; never having
117 returned the same, nor offered to return the same, nor any part or portion thereof, to the said company, its transferee, or any person or party whomsoever, as your petitioners will fully show upon the trial of this cause.

And your petitioners further show unto your honors, that, in addition to the independent obligation and liability of the city, your petitioners have the cumulative right to be paid all of the aforesaid warrants held by your petitioners as aforesaid out of the drainage tax now due and uncollected in the said city, amounting to a sum in excess of seven hundred thousand dollars ($700,000); that in and by the provisions of legislative act No. 30, of the sessions of 1871, hereinabove referred to, and in and by the stipulations and conditions found and contained in the aforesaid authentic act, of June 7, 1876, it was, and is now, the duty of the said city of New Orleans, to collect said tax, and to apply the same, or the proceeds thereof, to the extinguishment and payment of the warrants held by your petitioners; that the city of New Orleans, and the mayor and administrators thereof, during the month of April, 1881, and prior thereto, have arbitrarily and unlawfully refused, and do now refuse, to collect said tax for the purpose of paying the aforesaid warrants, or for any other purpose, and have gone so far as to counsel, advise, and influence the drainage-tax debtors not to pay, any part or portion of the drainage assessment lawfully imposed and levied upon their property; and that, by reason, and on account, of the illegal conduct of the said city, and the municipal officers aforesaid, the collection of the aforesaid drainage tax has been entirely prevented, and your petitioners have sustained a loss and damage to the full extent of the warrants held and owned by them as aforesaid—principal and interest.

Aver an amicable demand, and refusal to pay.

The premises considered your petitioners pray, that the city of New Orleans may be cited to appear and answer this petition; that in due course of law she may be condemned to pay unto your petitioners the sum of four hundred and thirty-six thousand, seven hundred and eighty-two $\frac{55}{100}$ dollars—$436,782.55, the face amount of the aforesaid drainage warrants together with the interest, at the rate, from the dates, and in the amount called for and prescribed therein; and that your petitioners may have such other and further order, judgment and decree as may be suited to law and the nature of this case, together with the costs of this suit in that behalf expended.

(Signed) LACEY & BUTLER,
Attorneys for John Crossley & Sons, Limited.

118 *Exception for "Oyer."*

Filed May 11, 1881.

JNO. CROSSLEY & SONS, LIMITED,
vs.
CITY OF NEW ORLEANS. } No. 9384.

To the hon. the judges of the United States circuit court for the fifth circuit and district of Louisiana:

And in this hon. court through undersigned attorneys appears the defendant herein The City of New Orleans and reserving the benefit of all exceptions, pleas or answers that may be made herein and without in any manner pleading to plaintiff's petition, says: That before so pleading or answering she is entitled to oyer and inspection of each and every one of the pretended drainage warrants on which this suit is founded as set forth in plaintiff's petition and the exhibits thereto annexed.

Wherefore, defendant respectfully prays that this prayer for oyer of the warrants sued on be granted; that plaintiff be ordered to file same within a delay to be fixed by the court and in default thereof that this suit be dismissed and she prays for general relief, etc.

(Signed) C. F. BUCK, *City Attorney.*
WYNNE ROGERS, *Of Counsel.*

Supplemental and Amended Petition.

Filed May 21, 1881.

U. S. Circuit Court, Eastern District of Louisiana.

JOHN CROSSLEY & SONS, LIMITED,
vs.
CITY OF NEW ORLEANS. } No. 9384.

To the honorable the judges of the United States circuit court, eastern district of Louisiana:

The amended and supplemental petition of John Crossley & Sons, Limited, respectfully represents:

That in the original petition herein filed, your petitioners have prayed that the city of New Orleans be condemned to pay unto your petitioners the sum of four hundred and thirty-six thousand seven hundred and eighty-two $\frac{55}{100}$ dollars, the face amount of the aforesaid drainage warrants, together with interest at the rate from the dates and in the amount provided for therein.

That your petitioners are desirous of enlarging the prayer of the said petition, by adding thereunto the following:

"And, in case of a failure on the part of your petitioners, to have and recover the judgment hereinabove prayed for, in whole or in

part, then, and in that event, the city of New Orleans may be
119 ordered, adjudged and decreed to pay into the hands of the administrator of finance of said city, out of the aforesaid claim for $436,782.55, such sum as the court may refuse to compel the said city to pay directly to your petitioners—in order that the same may be applied by the aforesaid administrator *pro rata*, to the payment and extinguishment of the drainage warrants held by your petitioners, and that failing, to the extinguishment of drainage warrants, as prescribed by section 8, act 30, 1871, and act 16 of 1876.

The premises considered your petitioners pray that the amendment aforesaid may be allowed, that the defendant be duly cited to answer this amended petition, and that judgment may be entered in conformity to the prayer of the original petition, and the amendments thereto, hereinabove set forth.

Petitioners further pray for general relief in the premises.

(Signed) LACEY & BUTLER,
Attorneys for John Crossley & Sons, Limited.

Let the within amended and supplemental petition be allowed and filed.

New Orleans, May 21st, 1881.

(Signed) EDWARD C. BILLINGS, *Judge.*

Exception.

Filed June 25, 1881.

JNO. CROSSLEY & SONS, LIMITED,
vs.
CITY OF NEW ORLEANS. } No. 9384.

To the hon. the judges of the circuit court of the United States for the fifth circuit and eastern dist. of La.:

And now appears The City of New Orleans, defendant herein, through undersigned counsel and reserving all other means of exception and defense, peremptorily excepts to plaintiffs' petition on the ground that it discloses no cause of action.

Wherefore she prays that this exception be maintained and plaintiffs' suit dismissed at their costs and for general relief, etc.

(Signed) C. F. BUCK, *City Att'y.*
WYNNE ROGERS, *Of Counsel.*

120 *Supplemental Petition.*

Filed Nov. 19, 1881.

U. S. Circuit Court, Eastern District of Louisiana.

JOHN CROSSLEY & SONS, LD., *vs.* THE CITY OF NEW ORLEANS. } No. 9384.

To the honorable the judges of the United States circuit court, holding sessions in and for the 5th circuit, eastern district of Louisiana:

The supplemental and amended petition of John Crossley & Sons, Ld., respectfully represents:

That, at the time of the commission by the city of New Orleans of the illegal and tortious acts and doings referred to in, and disclosed by, the original petition of your petitioners herein filed, the said city was indebted in an amount exceeding two hundred and fifty thousand dollars, for drainage assessments, levied and imposed by law; that certain citizens and property-owners of said city, were also indebted for their drainage tax, in a much larger amount; and that it was the lawful and bounden duty of said corporation, in enforcing and carrying out certain peremptory statutes of the State of Louisiana, for that purpose specially made and passed; and, in conformity to the contract referred to in the original petition, to have paid, promptly, its own indebtedness, as aforesaid, and to have enforced a prompt and vigorous collection of the drainage assessment, levied and imposed by law, upon other parties, for the purpose of paying certain drainage warrants, then and now owned by your petitioners and others.

Further your petitioners show, that the wrongs and offenses, above referred to, were done and committed, by the said city, among other improper notices, for the unjust and illegal purpose of evading the payment of a just debt, and to enrich itself at the expense of petitioners and others; furthermore, to influence the drainage tax debtors aforesaid, not to comply with certain obligations and duties resting upon and required of them, as good and law-abiding citizens of the State of Louisiana; and that the conduct of the said city, in the premises, was fraudulent, malicious, grossly negligent, and oppressive towards your petitioners, and other innocent and *bona fide* holders of drainage warrants, issued under and by virtue of the laws of the State of Louisiana, duly made and passed.

Further your petitioners show that by reason of the malicious, grossly negligent and oppressive conduct of said city as aforesaid, your petitioners have sustained a loss and injury to the extent of at least $500,000.00.

Wherefore, they pray for leave to file this their supplemental and amended petition; and, leave being granted, they further pray that

defendant may be cited to appear and answer the same; and
121 that they may have and recover a judgment against said city of New Orleans, in addition to that demanded in the original petition, and the first supplemental petition, in the sum of $500,000.00, with interest, costs, and general relief in the premises.

(Signed) LACEY & BUTLER, *Attorneys.*

Let the within amended and supplemental petition be allowed and filed.

New Orleans, November 19th, 1881.

(Signed) EDWARD C. BILLINGS, *Judge.*

Exception, etc., to Amended and Supplemental Petition.

Filed Dec. 1st, 1881.

JNO. CROSSLEY & SONS, LD., *vs.* THE CITY OF NEW ORLEANS. } No. 9384.

To the hon. the judges of the circuit court of the United States for the fifth circuit and eastern dist. of La.:

And now appears the defendant The City of New Orleans, and reserving the benefit of all other means of exception and defences, etc., except to the amended supplemental petition herein filed on the 19th Nov., 1881, on the ground to wit:

1st. That the allegations in said amended and supplemental petition are too vague and indefinite to enable this appearer with safety to plead thereto.

2d. That acts or pretended illegal or malicious acts of the "city" in which the pretended demand for damages is founded are stated in too loose, general and indefinite a manner to enable defendant to answer.

3d. That said petition if in other respects sufficiently specific, etc., discloses no cause of action.

Wherefore appearer prays that this exception be sustained and said amended and supplemental petition stricken from the record and dismissed or ordered to be amended within a delay to be fixed by the court; and as in duty bound, etc.

(Signed) C. F. BUCK, *City Att'y.*
WYNNE ROGERS, *Of Counsel.*

122 *Petition for Mandamus.*

In the case of State of Louisiana *ex rel.* John Crossley & Sons, Ld., *vs.* City of New Orleans *et als.*, No. 4890 of the docket of the civil district court for the parish of Orleans, division "A," and removed into the U. S. circuit court, eastern district of Louisiana, under the number 9935 of the docket. Transcript filed April 22, 1882.

Filed with and made part of bill of complaint.

(Stamps.)

STATE OF LOUISIANA:

Civil District Court for the Parish of Orleans.

STATE OF LOUISIANA *ex Rel.* JOHN CROSSLEY & SONS, Limited,
vs.
CITY OF NEW ORLEANS. } 4890.

Petition.

Filed Dec. 28, 1881.

To the honorable the judges of the civil district court for the parish of Orleans, State of Louisiana:

The State of Louisiana upon the relation of Jno. Crossley & Sons, Limited, a commercial concern established by articles of association, bearing date November 18, 1864, under the joint stock company act of England passed in the year 1862, having its domicil, or principal place of business, at Halifax, England, and the said company and each and every one, and all of the stockholders, being aliens to the United States, and subjects of the Kingdom of Great Britain and Ireland, bring this their suit against the city of New Orleans, a municipal corporation established and created by the laws of the State of Louisiana, within the parish of Orleans, State aforesaid, and a citizen of the said State, and *a citizen of the said State, and* of the United States. And your petitioners and relators show:

That heretofore, to wit, on or about the year 1858, a certain act was passed by the General Assembly of the State of Louisiana to provide for leveeing, draining and reclaiming swamp lands in certain portions of the parish- of Orleans and Jefferson and that in and by said act, three separate and independent drainage sections were established, known as the first, second and third drainage districts, *were established known as the first, second and third drainage districts,* and a board of commissioners provided for in each district. That the said boards were duly authorized and required to levy such uniform assessments upon the superficial or square foot of land situated within the drainage section or district of each board, as might

be necessary to defray the expense of constructing levees,
123 machinery, canals and other works necessary for carrying out the provisions of the aforesaid statute.

That for the purpose of more effectually providing for the drainage of the city of New Orleans, the State of Louisiana, in and by a certain act of the legislature of said State, known as act No. 30, passed at a session thereof, held in the year 1871, authorized and required the formation of a new and an additional drainage district, now known and designated as the fourth drainage district, and authorized and required the levy of a drainage tax upon all the property lying within such new or additional section, and against the owner and owners thereof.

And your petitioners and relators further show unto your honors that the city of New Orleans being the owner of property lying within each of the four districts aforesaid, under and by virtue of act 165, passed in the year 1858, and act 30 of 1871 was assessed in an amount exceeding three or four hundred thousand dollars as will more fully appear from the assessment-rolls of the several districts aforesaid which, or extracts from which, your petitioners and relators will introduce upon the trial of this cause.

That the tableaux or assessment-rolls aforesaid have been duly homologated and approved by courts of competent jurisdiction and by such homologation and approval final judgments have been rendered against the city of New Orleans, for the amount of the drainage assessments levied and imposed as aforesaid together with ten per cent. commission, 6 per cent. interest and costs.

That your petitioners and the relators aforesaid have caused to be served on William E. Huger, administrator and auditor of public accounts of said city a certified copy of the petition for the homologation of the drainage-tax tableaux or assessment-rolls of the several drainage districts aforesaid and of the several judgments aforesaid homologating and approving the same, and condemning the city of New Orleans to pay such assessments together with a certificate of the clerk, showing that no answer or opposition to the assessment or claim aforesaid was filed by the said city and that the several judgments against her as aforesaid have been, and are final and executory.

That at the time of serving the administrator of public accounts with the documents aforesaid relators requested the said administrator of public accounts to have the aforesaid judgments against the city of New Orleans and the extract from the assessment-roll showing the amount of her monied liability as a drainage-tax payer, registered in conformity to act 5 of the General Assembly of La. for the year 1870, and to make due provision for the prompt payment of such judgments, through the municipal budget, and the budget tax in strict conformity to the provisions of that statute.

That as payment of the aforesaid judgments, through the budget and the budget tax, will subject relators to great and unjust delay in realizing their money, the municipal authorities of New Orleans with a view of an early payment of said judgments by said city,

were requested by relators in addition to the register and the
124 budget tax aforesaid, to levy, impose, and collect without delay a special tax sufficient to pay off and extinguish said judgments, principal, interests and costs.

Furthermore, your petitioners and relators show unto your honors that defendants have refused to comply with relators' and petitioners' most reasonable demand, and have declared their intention to refuse and resist the collection and payment of the drainage tax and the drainage-tax judgments hereinabove particularly referred to.

Further they show, that relators as owners and pledgees are in the actual possession of drainage warrants issued under and by virtue of act 30, of 1871, and act 16, of 1876. That the indebtedness of the city of New Orleans as a drainage-tax debtor has, by law, been set aside as a special fund for the payment of the warrants so held by petitioners; and that relators have the legal right to enforce collection of such indebtedness and to apply the amount collected to the payment of the drainage warrants to an amount in excess of $380,000 as authorized and prescribed by law, there being no other person or persons authorized by law to protect their rights in the premises.

Wherefore your petitioners pray that a writ of alternative mandamus may issue directed to the city of New Orleans, Joseph A. Shakspeare, mayor; Blaney T. Walshe, administrator of finance; Jno. Fitzpatrick, administrator of improvements; William Fagan, administrator of commerce; J. V. Guillotte, administrator of water works, and public buildings; George Delamore, administrator of assessments; W. E. Huger, administrator of accounts; P. O. Meallie, administrator of police, all of the city of New Orleans, and that therein and thereby the said W. E. Huger, administrator of public accounts, may be commanded and required without delay to register the several judgments against the city of New Orleans aforesaid in strict conformity to the provisions of act 5 of 1876, together with extracts from the assessment-roll aforesaid, or some certificate, statement or exhibit particularly showing the amount of the indebtedness of the city of New Orleans under such judgments.

That in and by the alternative writ of mandamus aforesaid, the several defendants to this suit may be condemned and required to budget the aforesaid judgments and to provide for their payment in accordance with law, through a budget tax to be levied and imposed in accordance with the aforesaid statute, and with the law in such cases made and provided.

That as a very great delay will attend the collection of the budget tax, and the payment of the aforesaid judgments in that manner, that they, the said defendants, and each and every one of them in and by the alternative writ aforesaid may be commanded and required in addition to the aforesaid budget tax to levy at the same time a special tax upon all property situated within the corporate limits of the city of New Orleans liable to taxation, sufficient in amount to pay the aforesaid judgments, principal, interest, commission, and costs, after making an allowance of twenty per cent. for

deficiencies in collection; and to collect said tax, and pay over
125 the monies realized from such collection, without unreasonable delay and in accordance with the law in such cases made and provided, or show cause to the contrary at such time and place as may be fixed by your honors.

That the aforesaid alternative writ of mandamus in due course of law, may be made peremptory and absolute and that relators and petitioners may have such other and further judgment, order, and decree, as is suited to law, and the nature of the case.

(Signed) LACEY & BUTLER,
Att'ys for John Crossley & Sons, Limited.

Affidavit.

STATE OF LOUISIANA,
City of New Orleans.

Civil District Court.

STATE OF LOUISIANA *ex Rel.* JOHN CROSSLEY & SONS, LIMITED,
vs.
CITY OF NEW ORLEANS.

Frank N. Butler, one of the attorneys of John Crossley & Sons, Limited, being duly sworn, doth depose and say that he has read the foregoing petition and knows the contents thereof, and that the facts, allegations and averments set forth and contained therein are true.

Further he says that the said John Crossley & Sons, Limited, are beyond the jurisdiction of the State of Louisiana, and for that reason this affidavit is made by deponent, and not by the said John Crossley & Sons, Limited.

And finally he says that this affidavit is made to the best of deponent's knowledge, information and belief.

(Signed) FRANK N. BUTLER.

Sworn to and subscribed before me this 28th day of Dec'b'r, A. D. 1881.

(Signed) H. MIESTER, *D'y Cl'k.*

"Order."

Let an alternative writ of mandamus issue as within prayed for, and in accordance with law, returnable before this court, on Friday, the 13th day of January, 1882.

New Orleans, December 31, 1881.

(Signed) A. L. TISSOT, *Judge.*

126 *Pleadings in the Case of John Crossley & Sons, Limited, vs. The City of New Orleans.*

No. 10337 of the docket of the U. S. circuit court, eastern district of Louisiana.

Referred to and made part of bill of complaint.

Bill of Complaint.

Filed August 24, 1883.

To the honorable the judges of the United States circuit court in and for the eastern district of Louisiana:

John Crossley & Sons Limited, a body corporate and joint stock company, duly incorporated under the laws of the United Kingdom of Great Britain and Ireland, as such, an alien and subject of said United Kingdom, domiciled and doing business at Halifax, England, exhibits this their bill of complaint, filed on their own behalf as well as on behalf of all who hold obligations of the class held by your orators, who may intervene for their interest, willing to contribute to the costs of this suit, against the city of New Orleans, a municipal corporation created by the laws of Louisiana, for the government of said city, and a citizen of said State.

And, therefore, your orators and complainants say:

That in 1858, the legislature of Louisiana, to provide for the leveeing, draining and reclaiming swamp lands in certain portions of the parishes of Orleans and Jefferson, and thereby secure the proper drainage of New Orleans, passed an act by which all the lands between the Mississippi river, Lake Pontchartrain, the line of the Jefferson and Lake Pontchartrain railroad and Lafayette avenue, were directed to be drained, and were divided into drainage districts designated as the first, second and third districts; that by the authority of a later act of 1871, another drainage district was created, called the fourth draining district, within the limits of Lafayette avenue, the Mississippi river, Bayou Bienvenue and Florida walk, on a line connecting with Lafayette and People's avenues at a point nine thousand six hundred (9,600) feet from the river; and the ordinance creating said fourth draining district is herewith filed as Exhibit "A," and made part hereof.

That to fulfill the objects of said legislation, the said acts provided for the cutting and digging through said lands of all necessary canals; the making of all necessary levees; the placing on the lands of all steam-engines and machinery needed for the purpose; and authorized all other act- and things to be necessary to effect said drainage.

That to secure the funds required for said work, the said act of 1858 gave power to the boards of drainage commissioners, to whom the direction of the work was confided, to levy assessments upon the

lands to be drained, to be preceded by plans to be prepared by
127 said commissioners, exhibiting the lands to be drained, the nature of the work to be done, the names of the proprietors, accompanied with notices by publication of the deposit of said plans in the office of the recorder of mortgages of the parish in which the land was situated, announcing that such drainage as shown by the plans would be proceeded with, and stating the supposed time required for completion and probable cost of the work; the act further provided for the homologation or approval of said plans by the district courts of the parishes within which the lands were situated, clothing said courts with power, on proof of the publication of said notices to decree that all said lands were subject to a first-mortgage lien and privilege to secure its proportion of the cost of said drainage, with six (6) per cent. interest thereon; there was also provision in said act, for the recording of such final decrees in the office of the recorder of mortgages of the parish where the lands were situated; that by a subsequent legislative act it was provided that a tableau exhibiting said assessments for drainage should be prepared and filed in the proper district court; that due notice thereof should be given by publication, and on proof of such publication the court should have power to approve and homologate said tableau or assessment-roll, which should be a judgment against the property assessed, and against the owners thereof, for the amounts due by said owners for the amounts assessed upon said lands, on which judgments and executions should issue as upon other judgments, with ten (10) per cent. added to amounts assessed to pay costs and counsel fees. All of which more fully appears by reference to said acts, No. 165 of 1858, and No. 57, of 1861, specially referred to for fuller explanation and greater certainty.

Your orators further show that, in 1871, another act was passed by the legislature of Louisiana, by which the boards of commissioners for drainage created by former acts were superseded, and in place of said boards, the Mississippi and Mexican Gulf Ship Canal Company, a corporation provided with all requisite means to perform the work, was directed and empowered to dig canals through said lands, make protection levees near Lake Pontchartrain, and above and below the city, to secure the lands from overflow, and by the proper drainage pumps and machines, to be provided by said company, to release the lands from drainage water by lifting the drainage water from the canals over and into Lake Pontchartrain in the rear of the city; the said act providing with detail that the new instrumentality selected to prosecute and complete such drainage should do all things requisite and proper to attain said object; that the act subrogated the board of administrators of the city of New Orleans to all the rights, powers and privileges of the commissioners of drainage, possessed by them under previous acts, especially the power to collect and enforce all the drainage assessments levied and imposed to defray the costs of said drainage, and all judgments recovered for said drainage by the homologation of the assessment-rolls or tableaus: the act provided that for all

canals dug, levees made and other work performed by said
128 Mississippi and Mexican Gulf Ship Canal Company, payments should be made to said company from and out of all funds to be derived from said assessments, judgments thereof, or from the sale of property turned over by the commissioners to said administrators; the payments to be made at the rates fixed by the act for levees and excavations, either in cash or in warrants drawn by the administrator of accounts of said city upon the administrator of finance, payable from and out of said funds, with eight (8) per cent. interest from the date of presentation, the act declaring that all amounts derived from said assessments, judgments therefor, and other aforesaid assets, should be a trust fund for the payment of the work done by said company, and of the warrants issued to it for said work, and should be held and applied by such board of administrators in trust solely for the said Mississippi and Mexican Gulf Ship Canal Company, and for payment of said work and warrants issued therefor; all of which more fully appears by said act No. 30 of 1871, specially referred to for fuller explanation and greater certainty.

Your orators further show, that under said act the said Mississippi and Mexican Gulf Ship Canal Company proceeded with the said drainage work, excavated canals, made protection levees, provided and worked the machinery for draining the lands, and performed all services required by said act down to 1876, expending in the performance of the work large amounts of money; that said company received from the city of New Orleans warrants payable out of said trust funds amounting to upwards of five hundred thousand ($500,000) dollars, for the payment of which all said funds and the assessments, judgments therefor, and other assets aforesaid, were pledged.

Your orators, further complaining, says, that pursuant to the authority conferred by said acts of 1858 and 1861, the commissioners of drainage prepared and filed plans designating the lands to be drained, the subdivisions of property therein contained, the names of the proprietors, the dimensions and direction of the canals, and the places where the engines were to be located; that said plans were deposited in the office of the recorder of mortgages of the parishes where the lands were situated, and after due publication of the notices as required by said act that the commissioners would proceed to drain said lands, naming place of deposit of plans defining limits of the lands to be drained and indicating as nearly as possible the time required for completion and probable cost of the drainage, on the petition of said commissioners, decrees were rendered by the district courts designated by the acts that such portion of said property within the limits of the section or district to be drained exhibited by the plans, was subject to a first-mortgage lien or privilege in favor of said commissioners for such amounts as might be assessed upon said property for its part of the costs of such drainage, with interest thereon at six (6) per cent. per annum from demand, said judgment or decrees, the courts rendering same, dates of rendition and title of the proceedings are

as follows, to wit: The judgment "In the matter of the Commissioners of the *First* Draining District praying for a decree of
129 mortgage, privilege, etc.," duly rendered by the honorable the third district court of New Orleans, on the 24th of August, 1861; the judgment "In the matter of the Board of Commissioners of the *Second* Draining District, praying for a decree of mortgage privilege, etc.," duly rendered by the honorable the third judicial district court, parish of Jefferson, in suit No. 1938 of the docket, and signed on the 29th of April, 1861; the judgment "In the matter of the Board of Commissioners of the *Second* Draining District, praying, etc.," duly rendered by the honorable the third district court of New Orleans, and signed on the 9th of February, 1861; the judgment "In the matter of the City of New Orleans praying for a decree of mortgage, privilege, etc., upon property in the *third* draining district, etc.," duly rendered by the eighth district court, parish of Orleans, and signed on the 4th day of May, 1872; and the judgment "In the matter of the board of administrators praying for recognition and recovery of assessments in *fourth* drainage district," duly rendered by the superior district court, parish of Orleans, in suit No. 807 of the docket, on the 29th of January, 1873, and signed on the 3d of February of that year; which said judgments are herewith filed as part hereof, and marked Exhibits B, C, D, E and F.

Your orators further show, that under the authority conferred by said act of 1858, the board of commissioners of the first draining district, on the 12th of September, 1861, levied an assessment of three $\frac{3}{10}$ mills per superficial foot on the lands within said district, to pay the cost of said drainage directed by the act; that on the 11th of March, 1861, the board of commissioners of the second drainage district levied an assessment of two mills per superficial foot on the lands of said district, to pay said cost of drainage of said lands under same authority; that on the 11th June, 1872, the board of administrators of the city of New Orleans, then vested with the power to make said assessments by virtue of said act No. 30 of 1871, levied an assessment of two mills per superficial foot on all lands within said third district, to pay said cost of draining said lands; and on or about the 19th November, 1872, the said board of administrators, in exercise of said power, levied an assessment of two mills per superficial foot on all lands within the aforesaid fourth draining district, to pay the expense of draining same; all of which more fully appears by reference to the resolutions of said boards of commissioners and ordinances of the common council of the city levying such assessments, herewith filed and made a part hereof, and marked Exhibits G, H, I and J.

Further complaining, your orators show that the tableaus or assessment-rolls exhibiting the amounts assessed for such drainage, the names of the owners of the lands so far as known, and when unknown stating the owners to be unknown, were duly filed in the courts hereinafter mentioned, designated by said act of 1871, and on motion, as provided by such acts, after due publication of the order that all persons concerned show cause why such assessment should not be approved and homologated, said tableaus or rolls were duly

homologated and approved by the judgments of said courts, which by the terms of said act was and is now a judgment against
130 the aforesaid lands and the owners thereof for the amounts assessed and ten per cent. for costs and counsel fees, and said judgments, the titles of the proceedings, the courts rendering the same, and dates of rendition are as follows, to wit:

In the matter of the Commissioners of the First Drainage District, praying, etc., No. 25935, superior district court, parish of Orleans, the judgment homologating the assessment-roll for said district was rendered on the 21st of March, 1874, by the superior district court for the parish of Orleans. In the matter of the Commissioners of the Second Draining District praying, etc., No. 1938, the judgment homologating the assessment-roll of said district above Toledano street, was rendered by the third judicial district court for the parish of Jefferson, on the 15th, and signed on the 23d March, 1869. In the matter of the Commissioners of the Second Draining District praying, etc., No. 25393, the judgment homologating the assessment-roll for said district, below Toledano street, was rendered by the third district court for the parish of Orleans, on the 11th, and signed on the 18th November, 1868. In the matter of the Commissioners of the Third Drainage District praying, etc., No. 7482, the judgment homologating said assessment-roll for said district was rendered on the 8th, and signed on the 13th November, 1872, by the eighth district court for the parish of Orleans. In the matter of the board of administrators praying, etc., No. 807, the judgment homologating the assessment-roll for the fourth drainage district was rendered on the 15th, and signed on the 18th March, 1873, by the superior district court for the parish of Orleans. Said tableaus or assessments are specially referred to for fuller explanation and greater certainty, and copies of said judgments, marked B, C, D, E and F, are herewith filed and made part hereof.

Further complaining your orators show that in 1876, the legislature authorized the city of New Orleans to contract with the Mississippi and Mexican Gulf Ship Canal Company for the purchase of its rights and franchises, tools, implements, machines, boats and apparatus belonging to said company and its transferees, the purchase price of said property to be paid in drainage warrants, payable out of the drainage assessments imposed under previous acts; in accordance with said act the said purchase was made, the city receiving from said company the said machines, boats, apparatus and implements of very great value, for which it agreed and bound itself to pay three hundred and twenty thousand dollars ($320,000) in drainage warrants, to be enforced and collected by the city, which said warrants were accordingly delivered to the assignee of said company, and ever since the city has had the possession and enjoyment of said property, wholly disregarding its obligations to pay for the same, as is more fully stated hereinafter; that by such act the city assumed entire charge of said drainage, undertook to carry it on, availed itself of all the work done by said company, which, in compliance with all its obligations, had dug and excavated canals, built levees, and performed the services requisite to said drainage up to the 7th of June,

1876, when the city relieved the company and assumed
131 control of the work; that the work so performed by the company, in all respects conformable to the acts on the subject, was adequate to secure the drainage proposed; requiring, of course, proper efforts on the part of the city to maintain and prosecute the system of drainage; that if there has been any default in said work not admitted, it is due solely to the city since its assumption of the drainage work, and it follows that all of said drainage warrants issued for actual work and labor done by said company, and for said property bought, received and enjoyed by the city, but not paid for, are now entitled to be paid, and to the benefit of all the securities provided by said legislative acts. And your orators specially refer to said act No. 30 of 1871, for fuller explanation and greater certainty, and to the act of said purchase and settlement, of date the 7th of June, 1876, copy whereof marked Exhibit K, is herewith filed and made part hereof.

And your orators show that said warrants were negotiable, were secured by all said drainage assessments pledged for their payment and by the obligation of the city imposed by law, as well as expressly assumed by the city, to collect, enforce and apply the funds derived from all said drainage assessments and the judgments therefor, to the payment of all said warrants; that on the faith of this obligation of the city, and of these securities, your orators acquired and now hold for actual value given by them, four hundred and thirty-six thousand seven hundred and eighty-two $\frac{55}{100}$ dollars ($436,782.55), of said drainage warrants issued by the city, and thereafter acquired by your orators, part issued to said company for work and labor done, part issued under said act of 1876, for the property bought and received by the city, all of which are unpaid, entitled to be paid and to the enforcement of all the obligations and securities pledged for their payment; and your orators herewith file and make part hereof, copy of one of said warrants, and a list of those held by them marked Exhibits A l, and A m.

Your orators further show that said decrees of the courts subjecting all such lands to the first-mortgage lien and privilege to secure said amounts assessed for drainage, and homologating said assessment-rolls constituting personal judgments against the land-owners as well as the lands, for the amounts assessed, have been duly recorded in the offices of the recorder of mortgages of the parishes of Orleans and Jefferson, according to the situation of the lands, and are mortgages against the lands and owners thereof to secure said assessments, and that for the greater precaution, but not admitting the necessity thereof, proceedings have been instituted in the State courts to revive the judgments homologating said assessment-rolls.

Your orators further show that subsequent to the issue of said warrants, and to the assumption by the city of said drainage work, the legislature of Louisiana passed certain laws to exclude said lands from all liability for said assessments, to annul the judgments therefor, to cancel all liens, mortgages and privileges securing such assessments; and, finally, there is in the present city charter the

enactment to repeal all laws for the drainage of the city, and
132 forbidding the collection of said drainage assessments; all of which more fully appears by reference to the acts of the legislature, No. 48 of 1877, No. 167 of 1877, and No. 20, section 42, of 1882; specially referred to for fuller explanation and greater certainty.

Your orators show that the legislative acts under which said warrants issued, pledging said drainage assessments for their payment, were in legal effect contracts, under which the holders of the warrants were entitled to the benefit of all said securities, as well as to the fulfillment of the obligations of the city to enforce said assessments; that said legislative acts propose to liberate the lands, the owners thereof and the city of New Orleans from all liability to the holders of said warrants, entitled to all the securities the said acts propose to destroy; that said acts further propose to discharge the city from its obligations to pay the price of the property acquired by it under its contract of purchase of 7th June, 1876, to be paid from and out of the drainage assessments, which the city by its said contract bound itself to collect and enforce; that in effect these legislative acts design to destroy the right of property in these drainage assessments; invade the rights of your orators; free all parties from liability; cancel all securities on the lands, and deprive your orators and all the warrant-holders of all means of payment of these obligations, issued by the city, under the pledge of the guarantees and securities hereinbefore set forth, and your orators show that said legislative acts, and each of them, are void and null for plain repugnancy to the clauses of the Federal Constitution, that is to say the 1st article, section 10, and 15th amendment of that instrument, prohibiting legislation, impairing the obligations of contracts, and protecting the rights of property, by which your orator's rights are secured.

And further complaining, your orators show that the city itself is an owner of lands within the drainage districts and a judgment debtor for assessments levied upon said lands, exhibited by the assessment-rolls for said districts, duly approved and homologated, said assessments being as follows, that is to say:

In the first draining district	$230,733 30
In the second draining district	171,708 65
In the third draining district	208,879 40
In the fourth draining district	66,611 55

aggregating six hundred and seventy-seven thousand, nine hundred and thirty-two $\frac{95}{100}$ dollars, all of which is unpaid and should be paid and applied by the city to pay said drainage warrants, and your orators refer to said assessment-rolls for fuller explanation and certainty, and to the extracts therefrom, exhibiting said assessments against the city herewith filed as Exhibit A n, and made part hereof.

And your orators further show that since the said legislation of 1877, the city has failed to enforce said assessments, neither paying its own or enforcing the assessments against the other drainage

debtors, and now avers its purpose not to collect and enforce
133 said assessments, make provisions to pay said warrants, or comply in any manner with its obligations in the premises, and said avowal and refusal is manifested in the ordinance of the council of said city, passed on the 5th of April, 1881, and in the proclamation of the mayor of said city, published April 7th, 8th and 9th, 1881, copies whereof are herewith filed marked Exhibit "A o" and made part hereof.

And now your orators shows that all such drainage assessments and judgments, therefore being pledged for redemption of said warrants, the funds to be derived therefrom constituting a trust fund to be collected and applied by the city to pay the warrants; the city itself debtor for drainage assessments; bound also for the price of the aforesaid property, which it bought, received and uses, neither paying the price in money or enforcing the assessment, as it bound itself to do, from which the price was to be paid, and the absolute refusal of the city to do anything in the premises, leaving the warrants it issued wholly unprovided for, entitles your orators without action or remedy at law, upon these warrants, to invoke relief in equity; that the refusal of the city to collect the assessments and pay for said property from the amounts thereof so collected, makes the city liable for said purchase price, three hundred and twenty thousand dollars; that it is also liable for the said assessments owed by it, all of which is applicable to pay the said warrants, as are also all said drainage assessments and judgments, the refusal to collect which and abandonment of the trust and obligation in that respect, on the part of the city, entitles your orators to the appointment of a receiver to collect and enforce said assessments, and to have applied, under the order and direction of this court, the amounts for which the city is bound, and the amounts of such assessments, aforesaid, to the full payment of all said warrants, with interest and costs.

To the end, therefore, that the said mortgages, liens and privileges may be decreed to exist upon each portion of the property situated within the limits of the drainage districts, exhibited by the plans filed under the act of 1858, designating the lands to be drained, may be adjudged legal and valid; that the aforesaid assessments for drainage and judgments therefor, levied and imposed under said acts of 1858 and 1861, exhibited by said assessment-rolls or tableaus prepared, filed, affirmed and homologated under said acts, and the aforesaid decrees homologating said assessment tableaus may be decreed to be legal and valid judgments against the lands and owners exhibited by said tableaus, and be decreed to be enforced with interest and ten per cent. fixed by said acts; that a receiver be appointed with authority to demand, sue for, collect and enforce said assessments and judgments therefor; that the city of New Orleans be adjudged, bound and liable for the aforesaid assessments due by it, and for the purchase price of said property, and be condemned to pay the same, with interest; that an account be taken of all warrants entitled to payment from and out of said funds; that the said warrants held by your orators be decreed to be paid

134 with interest and costs, with all others equally entitled from and out of the aforesaid amounts for which the city is liable, and from and out of all amounts derived from said drainage assessments and judgments therefor, and as fast as said amounts are collected.

And that your orators have all such further relief *and* as the nature of the case demands and equity confers.

May it please your honors to grant unto your orators the writ of subpœna to be directed to the city of New Orleans, commanding it to be and appear on the day and in the delay named, before this honorable court, there to answer, all and singular, the premises aforesaid, and to stand to, perform and abide such orders the court may make in the premises, and your orators will ever pray.

BLANC & BUTLER,
MILLER & FINNEY,
Solicitors for Complainants.

Answer.

Filed Nov. 10, 1884.

In the Circuit Court of the United States for the Eastern District of Louisiana.

JOHN CROSSLEY & SONS, LIMITED,
versus
THE CITY OF NEW ORLEANS. } No. 10337.

The answer of The City of New Orleans, defendant, to the bill of complaint of John Crossley & Sons, Limited, complainants.

This defendant, now and at all times hereafter, saving and reserving to itself all and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties and imperfections in the said bill contained for answer thereto, or to so much thereof as this defendant is advised, it is material or necessary for it to make answer to, answering, says:

That, in the year 1858, the legislature of Louisiana, by act No. 165 of that year, entitled "An act to provide for the leveeing, draining and reclaiming of *swamp* lands in certain portions of the parishes of Orleans and Jefferson," enacted that certain portions of said parishes should constitute three drainage districts, designated, respectively, as the first, second and third drainage districts, and that for each of said districts there should be a board of commissioners, which was constituted, for the purposes of the act, a body corporate; and, that, whenever either of said boards was prepared to drain its respective district, it should cause a plan thereof to be made, accurately designating the limits thereof, the subdivision of property therein contained and the names of the proprietors, and deposit said plan in the office of the recorder of mortgages and give notice thereof by publication, and, after due publication, apply, by petition, to the

135 proper district court, which court upon due proof of publication, should decree that each portion of the property situated within said limits is subject to a *first-mortgage lien* and *privilege in favor* of such board of commissioners, for such amount as might be assessed upon said property. That the said board of commissioners were empowered to levy uniform assessments upon each superficial square foot of land situated within the district; and, that, on the non-payment of the amount of the assessment, judgment therefor should be recoverable before any court of competent jurisdiction, and the *land so assessed* should *be sold*, according to law, to satisfy said judgment; and the sum of $81,000, to be equally divided among said three draining districts, was appropriated out of the swamp-land fund, of the first swamp-land district of the State, for the purpose of said act.

That in 1859 the legislature of Louisiana passed an act, No. 191 of that year, supplementary to said act No. 165, of 1858, whereby the said boards of commissioners were authorized to issue bonds, having not more than thirty years to run, and bearing interest not exceeding eight per cent. per annum, to an amount not exceeding $350,000 for each drainage district; and, upon issuing such bonds, "to fix and determine the amount of assessment to be levied upon the superficial square foot" of land within the respective districts, and to apportion the amount to be paid yearly by the owners of said lands, in order to pay the annual interest on said bonds and the bonds at maturity; provided, that the amount of the assessment demandable yearly should not exceed one-tenth of such assessment.

That in the year 1861 the legislature passed an act, No. 57, of that year, whereby it was enacted "That the amount of assessment which the boards of commissioners of the several drainage districts are authorized to fix and apportion, to be paid yearly by the owner or owners of the lands within said districts, *in order to pay the annual interest on the bonds issued or to be issued by said boards of commissioners, by virtue* of the second section of an act supplementary to an act to provide for leveeing, draining and reclaiming swamp lands in certain portions of the parishes of Orleans and Jefferson, approved March 18th, 1858, shall be collected and sued for, the following mode of proceedings, to wit: As soon as any assessment has been made, and notice thereof shall have been given, a copy thereof shall be filed in the third district court of the parish of Orleans for the assessment made on the property within the limits of the parish of Orleans, and in the third judicial district court, sitting at Carrollton, for assessments made on property within the limits of the parish of Jefferson, on which tableau of assessment thus to be filed the property assessed shall be set forth, together with the amounts assessed and the names of the owners thereof: * * * that a petition shall be filed with said assessment-rolls, praying for an order that all persons whom it may concern do show cause within thirty days from the first publication of said order, why said assessment-roll should not be approved and homologated, * * * and, after said publication, the said courts shall, on motion of the coun-

136 sel of said boards of commissioners, approve and homologat
said assessment-rolls, which shall be a *judgment against th*
property assessed and the owners thereof, on which *execution* may issu
as on judgments rendered in the ordinary mode of procedure, an
the court shall, at the same time, and in the same judgment, orde
delinquent parties to pay ten per cent. in addition to the amoun
assessed to pay counsel fees and costs.

Respondent says that it is true, as stated in the bill, that an ad
ditional drainage district, with the extent and limits stated in th
bill, was established, and assessments upon the property therei
made by ordinances of the board of administrators of the city upo
assumption of authority so to do, under and by virtue of act N
30, of 1871, mentioned in the bill, but this respondent says that th
said ordinances and the said act of the legislature, in so far as con
strued, to confer such authority, and the further authority, a
claimed, to proceed for the enforcement of said drainage asses
ments, by the summary mode of procedure described in act No. 5
of 1861, have been subsequently, repeatedly, and uniformly hel
by the courts of the State to be void and *and* inoperative; and r
spondent further says that in the suit entitled Mississippi and Me
ican Ship Canal Company *vs.* City of New Orleans, 35 An., p. 68,
was expressly held by the supreme court of the State that the city
New Orleans was not liable to any extent or for any sum whateve
for said assessments and judgment therefor, claimed to have bee
recovered therefor, in proceedings had under and in conformity t
said act No. 57, of 1861, and act No. 30, of 1871; and this respon
ent says that, by virtue and effect of said final judgment of the s
preme court, the complainants *as* barred and stopped from claimin
any relief in this proceeding against this respondent by reasons
said assessments and judgments; and respondent hopes it ma
have the same benefit of this ground of defence as if it had availe
itself thereof in the form of a plea to so much of said bill as relat
to said assessments and judgments.

Respondent says that it is true that by said act No. 30 of 187
the said boards of commissioners created by said prior acts we
superseded, and that the Mississippi and Mexican Gulf Ship Can
Company were empowered to carry on a system of drainage, an
that the board of administrators of the city of New Orleans we
subrogated and succeeded to the rights and duties of said board
commissioners to the extent stated in said act; and respondei
says that by said act it was provided that all work done by sa
Mississippi and Mexican Gulf Ship Canal Company should be pa
for out of a drainage fund to be derived from said assessments, t
payments to be made at the rates fixed by the act, either in cash,
where there was no cash at the time to the credit of said fund,
warrants upon said fund, to be drawn by the administrator of a
counts on the administrator of finance, and that said drainage fun
was declared by said act to be a trust fund for the payment of sa
warrants.

Respondent admits that under said act the said company pr
ceeded with said drainage work and received drainage warran

therefor to about the amount stated in the bill and that for
137 the payment of said warrants the said drainage fund and the said assessments and judgments were pledged; that it is true that under said acts of 1858, 1859 and 1861, plans were filed, proceedings had and judgments entered, as stated in the bill; but, this respondent says, all of said proceedings and judgments, in so far as they were had and obtained in conformity to said act No. 57 of 1861, have subsequently been held by the State courts, repeatedly and whenever called in question or sought to be maintained or enforced, to be void and inoperative.

This respondent admits that the several drainage assessments made by said boards of commissioners and board of administrators of the city of New Orleans and the divers proceedings and judgments for the enforcement thereof, averred and set forth in the bill, were made and had at the rates, and at the times and in the manner stated in the bill; but this respondent says that subsequent thereto and in proceedings had at the suit as well of complainants as of respondent for the maintenance and enforcement thereof in the State courts of competent jurisdiction, said proceedings and judgments have been repeatedly and uniformly held to be void and inoperative.

Respondent says, that in 1876, the legislature passed an act, No. 16 of that year, entitled "An act to authorize the city of New Orleans to assume exclusive control of all drainage works in the drainage districts; authorize the purchase of certain rights and property of the Mississippi and Mexican Gulf Ship Canal Company and its transferee; and to provide for the manner of making said purchase and for paying therefor *in drainage warrants*," by which act the common council of the city of New Orleans was authorized and empowered to contract with the said company and the transferee thereof for such purchase, and by the third section of which act it was expressly and specially enacted and declared that all amounts to be paid as the price and consideration of said purchase "shall be *paid in drainage warrants* by the city of New Orleans, which said warrants shall be issued in the same form and manner as those heretofore issued to the transferee of said company under act No. 30, of acts of 1871, for work done;" and that such warrants "shall be made *payable out of the drainage assessments*;" and by the fourth section of said act "that whenever the sale and purchase contemplated by this act shall be completed and the drainage warrants issued in payment of the price agreed on and fixed, the city of New Orleans, through its officers, shall have exclusive control of all the rights, powers and franchises granted by act No. 30, of acts of 1871, relative to drainage or other public works to the Mississippi and Mexican Gulf Ship Canal Company or its transferee; the city of New Orleans shall alone have the power, either through its own officers or employees, or by contract to the lowest bidder, to do all canal-ing, dredging, ditching or drainage work required to be paid for by assessment upon property or from the city treasurer."

And this respondent says that it is true, as stated in the bill, that in accordance with said act No. 16, of 1876, the purchase contem-

plated and provided by said act was made by the city from
138 the company and the transferee of said company, on the 7th of June, 1876, as per notarial act of purchase and settlement of that date, a copy of which is annexed to the bill as Exhibit K; and that by said act it agreed and bound itself to pay three hundred and twenty thousand dollars in drainage warrants, and that said warrants were accordingly delivered to the assignee of said company, as stated in the bill.

Respondent says that it is true that since said purchase the city has had possession and enjoyment of the property so purchased except as to a portion thereof, from which it has been evicted by creditors of the said Mississippi and Mexican Gulf Ship Canal Company, asserting rights thereupon paramount to the right acquired thereto by the city by said purchase from the said company and the transferee of said company, Warner Van Norden; but respondent says that it is not true as stated in the bill, that the city has wholly disregarded its obligation to pay for said property, but that on the contrary, the truth is that it made payment therefor in full in the manner stipulated for at the time of said purchase as stated in the same paragraph of the bill, in drainage warrants then delivered to the transferee of said company to the amount stated in the bill; and that this form of payment was the sole and only form of payment for which the municipal corporation of the city of New Orleans *was competent* to obligate or bind itself under the express terms of said act No. 16, of 1876. This respondent says that the law under which said drainage warrants were executed and delivered as the price and consideration of said purchase, as well as the laws under which said drainage warrants were issued, for work done under the terms of said acts, contemplated and intended that the drainage assessments, to meet and pay said warrants should be enforced and collected by said city, and that all amount- collected therefrom should constitute a trust fund, to be held and applied to the payment and satisfaction of such warrants, the city not being entitled to apply any portion of such fund to any other purpose, except in the event of a surplus thereof remaining after the payment of all of said warrants; and respondent says that large sums *to* have heretofore been collected by it from such assessments and passed to the credit of said drainage trust fund, and that all amounts so collected have been applied to the payment of drainage work and drainage warrants, issued under the terms of said act; and as to the residue of said assessments remaining uncollected, that is has used all due diligence to collect the same by means of the judicial proceedings stated in the bill, and otherwise, without avail.

This respondent says that the said acts under which said warrants were issued, never contemplated or intended that they should become payable in any event or contingency, otherwise than out of said drainage fund, and that said warrants were executed and accepted with full knowledge by all parties that they were not, and could not, in any event, become chargeable to the city of New Or

leans, or payable by it, otherwise than out of said drainage
139 fund; that the corporate authorities of said city were and are, wholly without power or competency to bind the municipality to pay, or to provide means to pay said drainage warrants, otherwise than out of said drainage fund; and that it has at no time been competent to the corporate authorities of said city, under said acts or under any law applicable to the claims evidenced by said warrant, by any act or failure to act, on their part to incur any corporate liability in respect of said warrants, other than to the extent above stated, or to change the character of the liability or obligation evidenced by said warrants, from a charge upon a particular and specific fund, to wit, the drainage fund aforesaid, into a general liability or obligation of the municipality, to be met by general municipal taxation, or otherwise, than out of the particular fund to be derived from said drainage assessment.

And respondent says that the said drainage assessments were and are amply sufficient in amount, if collected, to meet and pay all of said drainage assessments outstanding; that without fault of this respondent it has to a large extent been unable to enforce and collect said assessments; respondent admits that the holders of said drainage warrants are entitled to the benefit of all of said assessments, and of the proceedings and judgments stated in the bill, as far as they can be made effective and available as securities for the payment of said warrants, and to the appointment by the court of a receiver to enforce and collect said drainage warrants and to render said securities effective as far as may be, this respondent expressly admitting its inability to enforce or collect said drainage assessment or to enforce said judgments by further proceedings in the State courts or otherwise.

Respondent denies that said drainage warrants, though it is admitted that they are drawn payable to order, are negotiable securities; and says that the laws hereinabove set forth under which said warrants were executed do not authorize or empower the execution or issuance by the city of New Orleans of securities negotiable in form; that the said warrants are not in the form of a bond or note of the city of New Orleans, binding the city absolutely for the payment of a certain sum of money at a certain time, but are merely orders drawn by one officer of the city, the administrator of accounts, on another officer of the city, the administrator of finance, for the payment of the sums of money specified in such orders, out of a particular fund, to wit: the drainage fund, and not otherwise; and this respondent says that the holders or owners of such warrants, other than payees named in the warrants, are not entitled to claim the right to be dealt with as holders of negotiable securities, but can only claim as ordinary transferees or subrogees of the original holders.

Respondent denies that complainants are the owners, or holders, or lawful possessors of $436,782.55 of said drainage warrants, or of any of said warrants described in Exhibits A e, and A m, annexed to the bill. Respondent says, that said warrants are all of them the property of the Louisiana savings bank, a body corporate under the

laws of Louisiana, now insolvent and in liquidation in the courts of the State; that in a certain suit instituted by complainants
140 against the said Louisiana savings bank, in liquidation, in the civil district court of the State of Louisiana, for the parish of Orleans, and numbered 350 on the docket of said court, a final judgment has been rendered by said court, from which an appeal to the supreme court of the State, which decreed that all of said drainage warrants described in said exhibits, to the bill of complaint in this cause, are the property of said Louisiana savings bank, and that John Crossley & Sons, Limited, the complainants in this cause, have no interest in said warrants, beyond holding them as collateral security, for the reimbursement of a loan stipulated, to be made by them to said bank, by a certain letter of credit of May, 1879; that only a portion of the loan so stipulated to be made, was made; and that said John Crossley & Sons, Limited, are not entitled to hold said warrants, even as collateral security, except upon condition of the payment by said John Crossley & Sons, Limited, to the said Louisiana savings bank, in liquidation, of the sum of $78,712.50; and the said judgment condemned the said John Crossley & Sons, Limited, in default of the payment of said sum, within sixty days to deliver said warrants held by them to the said bank; and this respondent is advised and says, that in the event of the affirmance by the supreme court of said judgment and the refusal or failure of complainants to pay said bank said sum of $78,712.50, as a condition precedent to their right to hold said warrants as collateral security as aforesaid, the said bank will be entitled to possession of all of said warrants, as owners thereof, and to hold this respondent liable and accountable in respect of whatever obligation of this respondent is evidenced by said warrant, and, in the meantime, this respondent submits that it is inequitable and unlawful to hold this respondent accountable in this proceeding, to said John Crossley & Sons, Limited, in respect of said warrants, the said complainants not being the owners of said warrants, or entitled to hold and enforce them as collateral security, as aforesaid; and this defendant hopes it may have the same benefit of this ground of defence, as if it had availed itself of it by way of plea to the whole bill, and all of the relief prayed for by complainants.

Respondent admits that the legislative acts under which said drainage warrants were issued, pledging said drainage assessments, for their payment, were, in legal effect, contracts under which the lawful holders of said warrants were and are entitled to the benefit of all of said securities, and that the several subsequent legislative acts in the bill specified, in so far as they purport, or were intended to impair the obligation of said contracts in the manner specified in the bill or otherwise, are null and void, for repugnancy to the Constitution of the United States, as stated in the bill.

Respondent admits that the lawful holders of said drainage warrants are entitled to the fulfillment of the obligations of the city, to enforce said assessments in the manner contemplated and intended by the acts under which said warrants were issued, in so far as said acts have not been held by the courts of the State to

be inoperative and void, and that said obligation remains unaffected by any of said subsequent legislative acts specified in the bill;
141 and this obligation, respondent says it has heretofore discharged to the best of its ability by making the assessments and taking the judicial proceedings stated in the bill and other proceedings, but that these proceedings have, in the main, been rendered abortive and ineffective by rulings and judgments of State courts of competent jurisdiction, for which it is in nowise responsible or accountable; and, further, this respondent says again that, had there been any unlawful or improper action or failure to act by the city authorities in the premises, which is not admitted, but denied, by no action or failure to act of the corporate authorities, in the manner charged in the bill, or otherwise, could any other corporate liability or obligation in respect of said warrants be incurred than that specified in the acts under and by virtue of which they were issued, or the municipality be rendered liable for the payment of said warrants out of any other fund than the said drainage fund created by said act, and that, at no time, has it been competent to the corporate authorities, by any action or refusal or failure to act on their part, to change or enlarge the character of the indebtedness evidenced by said warrants from a charge on a particular fund, to wit: the drainage fund, as aforesaid, to a general corporate indebtedness or liability chargeable against the corporate revenues generally, to be provided for by general corporate taxation, levied without reference to ownership of lands assessed for drainage under said acts authorizing the issuance of said warrants.

Respondent admits the ownership of much, though not of all, of the property described in the bill, as the property of the city of New Orleans. Among the property so described is the square upon which the United States mint is located, which is not the property of the city; included in such description, also, are all the streets, public landings, and places permanently dedicated to public use, the right of the city to which is rather that of administration than of ownership, involving the *jus disponendi*, as such streets, landings and public places cannot be lawfully diverted to other than the public uses to which they are dedicated. Respondent says that the character of the property described in the bill as the property of the city of New Orleans, and claimed to be subject to drainage assessments for which it is charged, that the city is directly liable to the amount in the aggregate of about $677,932.90, is such as to exempt it from all such liability, and from all liability to be assessed or taxed for any purpose, being lands occupied by streets, landings, squares, parks and other public places, and by the court-houses, occupied and used by the State and municipal courts, the municipal or city hall, the parish and police jails, school-houses, engine-houses and other structures, and buildings dedicated to public and corporate uses, and essential to the discharge of the public, police and governmental functions of the municipality, as a political subdivision of the State government.

Respondent says that exemption from assessment and taxation is implied in all cases of public property, and that it is always to be

presumed that the general language of statutes is made use of with reference to taxable subjects, and that the property of mu-
142 nicipalities is not in any sense taxable, and is, by clear implication, excluded from all assessment and tax laws; and, respondent says, it is manifestly implied in all of said statutes hereinbefore set forth, that the streets and landings and public places, and property of the city dedicated to necessary corporate uses for purposes of education, police and municipal government, were not intended to be embraced within the purview of the said several acts authorizing the said drainage assessments, from the fact that all lands intended to be subjected to such assessment are, by the terms of said act subjected to special liens and mortgages and to the liability to be seized and sold under execution for the enforcement of said assessment, which provisions, plainly, could never have been designed to embrace the streets, landings and public places of the city and its property dedicated to educational, police and governmental uses; and this, respondent says that the assessment of such property upon said assessment-rolls is entirely without warrant of law and cannot be enforced in this proceeding or otherwise.

And this respondent denies all and all manner of unlawful combination or confederacy, wherewith it is by the said bill charged, without this, that there is any other matter, cause or thing, in the said complainant's said bill of complaint contained, material or necessary for this respondent to make answer unto, and not herein, well and sufficiently answered, traversed and avoided or denied, that is true, to the knowledge or belief of this defendant; all of which matters and things this defendant is ready and willing to aver, maintain and prove, as the court shall direct, and respectfully prays to be hence dismissed with costs.

(Signed) W. H. ROGERS,
City Att'y, Solicitor for Def't.

Pleadings.

In the case of James W. Peake *vs.* City of New Orleans, No. 11614 of the docket of the U. S. circuit court, eastern district of Louisiana.

Made part of and referred to in bill of complaint.

Bill in Chancery.

Filed August 10, 1887.

To the judges of the circuit court of the United States for the eastern district of Louisiana:

James Wallace Peake of the city of New York and a citizen of the State of New York brings this his bill on his own behalf as well as on behalf of all other parties holding obligations of the same nature and kind as your orator or obligations that are susceptible of being reduced to the same nature and kind as your orator's who may intervene for their interest herein and may contribute to the costs and expenses of this suit, against the city of New Orleans, a

municipal corporation created by the statutes of the State of Louisiana, and a citizen of said State.

143 And thereupon your orator complains and says:

That by act No. 165 approved March 18th, 1858, the legislature of the State of Louisiana provided for the leveeing, draining and reclaiming swamp lands in certain portions of the parishes of Orleans and Jefferson of said State, the limits of which were fully described in the 1st section of said act and which were respectively divided into three draining districts, and these were respectively designated as the first, second and third draining districts, and to which by a subsequent act of the legislature (which will be referred to hereinafter) *and* the district called the fourth draining district was added; that — 2nd section of said act for the purpose of carrying out the provisions of said act it was provided for the appointment of a board of commissioners for each of said districts, who were by the fourth section of said act invested with all the rights and powers necessary to drain said several draining districts; and to that end they were authorized at all times to enter the lands within said districts to place engines and machinery thereon and to dig all necessary embankments and levees, and generally to do all things necessary to be done in draining, cleaning and reclaiming the lands within said districts; and by the fifth section of said act said boards were each authorized to sue and be sued.

And your orator further shows that by the seventh section of said act said boards of commissioners were empowered to levy, drain and reclaim the lands in their respective districts as follows, to wit: Whenever either of said boards of commissioners were ready and prepared to drain their respective sections or districts such board was directed to cause a plan thereof to be made, accurately designating the limits of the section or district to be drained, as far as possible, the subdivisions of property therein contained, and the names of the proprietors, also the dimensions and directions of the canals to be dug, and the place where the steam-engines would be placed, which plan or plans were to be deposited in the office of the recorder of mortgages of the parish in which the section or district to be drained was situated, and notices were directed to be inserted in French and English in two newspapers, once a week, for four successive weeks, announcing that said board of commissioners would proceed to drain such sections, and describing the place where the plan thereof was deposited, accurately defining the limits thereof, and indicating as nearly as possible the time when the draining thereof would be completed, and the probable cost of the work; and said section further provided that after the publications aforesaid, that said boards of commissioners should apply by petition to one of the district courts in the parish of Orleans for the portion of the section or district lying within the limits of said parish, and to the district court in the parish of Jefferson, for that portion of the section or district lying within said parish, which court or courts were directed upon due proof having been made of the publications of the notices aforesaid, to decree that each portion of the property situated within said limits was subject to a first-mortgage lien and

privilege in favor of such boards of commissioners for such
144 an amount as might be assessed upon such section or district, and interest thereon at six per cent. per annum from demand thereof, which decree of the district court of the parish of Orleans was directed to be recorded in the office of the recorder of mortgages in and for said parish, and the decree of the district court for the parish of Jefferson was directed to be recorded in the office of the recorder of said parish, which lien, privilege and first mortgage it was further declared by said section should take precedence over all mortgages, liens and privileges whatsoever, whether tacit, conventional, legal or judicial, and should attach to such property until the amount assessed and the interest thereon should be paid in full.

And your orator further shows that by the eighth section of said act said boards of commissioners, each within its respective district or section was given the right and authority and power to levy such uniform assessment or assessments upon the superficial or square foot of lands situate within the draining section or district of such board, to defray the expense of the construction of the levees, machinery, canals and other works necessary for the purpose of carrying out the provisions of said act as applicable to its particular district, which assessment was to be collected, from time to time, as the wants of such boards might require; and the ninth section of said act provided that for the non-payment of the amount of said assessment judgment therefor should be recoverable before any court of competent jurisdiction, and the lands so assessed should be sold according to law.

And your orator further shows that an act supplementary to the above act No. 165, approved March 18, 1858, was duly passed by the legislature of Louisiana and approved March 17, 1859, being No. 191 of that year, by which it was enacted in the first section thereof that to enable said boards of commissioners to carry into effect the provisions of said act No. 165 approved March 18, 1858, and to commence the work therein contemplated, that each of said boards of commissioners should have power and authority to issue bonds in the sum of $500, each having not more than thirty years to run and bearing interest not exceeding 8 per cent. per annum, to be designated "draining bonds," which bonds were not for any one draining district to exceed $350,000, and by the second section of said supplementary act it was provided that it should be the duty of said boards of commissioners upon issuing the bonds aforesaid, to fix and determine the amount of assessment to be levied upon the superficial or square foot of land situate within the draining district or section of such board or boards in accordance with the provisions of the aforementioned original act approved March 18, 1858, and fix and apportion the amount to be paid yearly by the owners of said lands in order to pay the annual interest on said bonds, and such bonds as might mature, and the manner of redeeming said bonds was provided for in other sections of said act.

And your orator further shows that the legislature of the State of Louisiana by an act approved March 1, 1861, being No. 57 of that year, and entitled An act to provide for the "collection of the assess-

ments for draining under the acts of March, eighteen hundred
145 and fifty-eight and act supplementary thereto of March seventeenth, eighteen hundred and fifty-nine" enacted that the amount of assessment which the boards of commissioners of the several draining districts were authorized to affix and apportion to be paid yearly by the owner or owners of the land within said districts, in order to pay the interest on the bonds issued or to be issued by said boards of commissioners and such bonds as might mature by virtue of the second section of said supplementary act No. 191, approved March 17, 1859, should be collected and sued for as follows, to wit: As soon as any assessment had been made notice thereof should be given, a copy thereof should be filed in the third district court of New Orleans, for all the assessments made on the property within the limits of the parish of Orleans, and in the third judicial district court sitting at Carrollton, for assessments made on property within the limits of the parish of Jefferson, and on which tableau of assessment thus to be filed the property assessed should be set forth with the amounts assessed and the names of the owners thereof, if known, and if the owners' names were not known, then it should be stated in said assessment-roll that the property assessed belonged to owners unknown that a petition should be filed with said assessment-roll, praying for an order that all persons whom it might concern, do show cause within thirty days from the first publication of said order, if any they had, why said assessment-roll should not be approved and homologated; that said order thus rendered should be published in the French and English languages, at least twice a week for thirty days, in one newspaper published in New Orleans as to the order of the third district court of New Orleans and in one newspaper published in the parish of Jefferson as to the order of the third judicial district court sitting at Carrollton, and that after said publications, the said courts should on motion of counsel of said boards of commissioners, approve and homologate said assessment-rolls, which should be a judgment against the property assessed and the owners thereof, on which execution might issue as on judgments rendered in the ordinary mode of proceedings, and that the court should at the same time and in the same judgment order the delinquent parties to pay ten per cent. in addition to the amount assessed to pay costs and counsel fees.

And your orator further shows, that afterwards, to wit: in the year 1871 the legislature of the State of Louisiana by act No. 30 of that year, authorized and empowered the Mississippi and Mexican Gulf Ship Canal Company, a corporation then existing and domiciled in the city of New Orleans to excavate drainage canals and build protection levees, within the then limits of New Orleans and Carrollton, *and* certain terms and conditions expressed in said act, and by the second section thereof said company was authorized and empowered to dig a canal and with the earth removed from the same to build outside of said canal a protection levee in the rear of the city of New Orleans and near the shore of Lake Pontchartrain,

the exact location of said canal and levee and all canals
146 to be dug and levees to be built by said company, to be designated and fixed by the board of administrators of said city of New Orleans; and by the sixth section of said act it was made the duty of the said board of administrators of the city of New Orleans immediately after the passage of said act, not only to locate the lines of the canals and protection levees specified in the various sections of said act, but they were also required to build and run all the pumps and drainage machines necessary to lift the drainage water from the said canal or canals over into Lake Pontchartrain and to keep the water in the canals in process of excavation as far as practicable at a proper level for the work of excavation, and at the same time assist the drainage of the adjacent lands; and by the eighth section of said act it was made the duty of the city surveyor of New Orleans or an engineer appointed by said board of administrators for that purpose, to examine the work done by the said Mississippi and Mexican Gulf Ship Canal Company during each month, and upon measurement of the width and depth of the canal or canals or parts of canals dug and protection levees built, to certify as to the number of cubic yards excavated, and the number of cubic yards of protection levees built during said month, and that it should be the duty of the administrator of accounts, on the presentation to him of said certificate of the city surveyor or engineer appointed as aforesaid to draw a warrant or warrants on the administrator of finance in payment of the work so done at the rate of fifty cents per cubic yard for excavation and fifty cents per cubic yard for the protection levees built, the said warrants to be of such denomination as might be required by the president of said company and these warrants it was the duty of the administrator of finance to pay on presentation to him in case there *was* any funds in the city treasurer to the credit of the said Mississippi and Mexican Gulf Ship Canal Company, but should there not be sufficient funds to cash said warrant or warrants, then the administrator of finance was by said act required to endorse upon the same the date of presentation, after which date the said warrant or warrants bore interest at the rate of 8 per cent. per annum until paid; and by the ninth section of said act it was enacted that in order to provide funds for the payment of the work to be done by the said company, that the three boards of commissioners for the draining districts of New Orleans and Jefferson established under the acts of March 18, 1858, March 17, 1859, and the several acts amendatory thereof, and any and all other person or persons or corporations, who might have been in possession should transfer to the board of administrators of New Orleans all money, assessments and claims for drainage in their hands, or under their control, all titles to real estate, all books, plans, tableaus and judgments in favor of commissioners the office furniture of said drainage commissioners, *a true statement of the claims of drainage commissioners against the city of New Orleans* to be adjudicated and settled out of the money collected by the city of New Orleans, and pertaining to said drainage districts, and that the board of admin-

istrators of New Orleans should be and were thereby subrogated to all the rights, powers and facilities possessed and enjoyed by the
147 commissioners of said several drainage districts or any other corporation charged with the duty of drainage and leveeing within the limits of the city of New Orleans and Carrollton; and the said board of administrators were directed to collect from the holders of property within said drainage districts the balance due on the assessments as shown by the books of the first, second and third drainage districts, under acts of March 18, 1858, that of March 17, 1859, and the several supplementary and amendatory acts thereto, and which assessments were thereby confirmed and made exigible, and further to make assessments of two mills per superficial foot in those parts of the three draining districts as existing and created by the said acts of March 18, 1858, and March 17, 1859 and amendments thereto, and on such other lands as should be brought within the protection levees contemplated by said act No. 30 of 1871, where no assessments had been made, and to execute and enforce the same as provided by the several acts of the legislature creating and regulating said boards of draining commissioners, and that all moneys received by the said boards of administrators from the said commissioners of draining districts, the collection of claims for drainage then due, from the collection of assessments, and from any of the sources of revenue contemplated by the provisions of the aforesaid section No. 9 should be placed to the credit of said Mississippi and Mexican Gulf Ship Canal Company and be held as a fund to be applied *only* to the drainage of New Orleans and Carrollton (as a whole, and which was a virtual consolidation of all of said draining districts and the additional territory brought within said protection levees), in accordance with the provisions of said act, and that all money so received should be held in trust for the payment of said Mississippi and Mexican Gulf Ship Canal Company, *prorated* that the rights, powers and faculties possessed and enjoyed by said board of administrators of New Orleans relative to drainage, should be so construed as not to conflict with the rights and faculties acquired by said company in excavating canals and building levees as stipulated in the various sections of said act; and the twelfth section of said act further provided that said act should be favorably construed, so as to favor all the purposes and objects of the same and the operations of the provisions thereof. All of which will more fully appear from all of the aforementioned acts which are made part hereof.

And your orator further shows that on the 7th day of February, 1872, under and pursuant to said act No. 30 of 1871, said board of administrators of the city of New Orleans adopted an ordinance creating the fourth draining district, as will more fully appear by reference to a copy thereof herewith filed and made part hereof and marked "ordinance 1359."

And your orator further shows that said board of draining commissioners were duly appointed, qualified and organized and entered upon the discharge of the duties imposed upon them by the various acts of the legislature hereinbefore referred to, and pursu-

ant to said acts respectively prepared, filed and deposited in the office of the recorder of mortgages of the parishes wherein
148 the lands to be drained were situated their plans designating therein the lands to be drained, the subdivisions of property therein contained, the names of the proprietors, the dimension and direction of the canals and the places where the engines were to be located; and after due publication of the notices as required by said acts that the said commissioners would proceed to drain said lands, naming the place of deposit of plans defining the limits of the lands to be drained, and including as nearly as possible the time required for the completion and probable cost of the drainage and on the petition of said commissioners, decrees were rendered by the district courts designated by said acts, that such portion of said property within the limits of the section or district to be drained exhibited by the plans was subject to a first lien and privilege in favor of said commissioners, for such amounts as might be assessed upon said property for its part of the costs of such drainage with interest thereon at six per cent. per annum from demand; said judgments or decrees, the courts rendering the same, the dates of rendition and the title of the proceedings are as follows, to wit:

The judgment "In the matter of the Commissioners of the First Draining District praying a decree of mortgage, privilege," etc., duly rendered by the honorable the third district court of New Orleans on the 24th of August, 1861; the judgment "In the matter of the Board of Commissioners of the Second Draining District praying for a decree of mortgage privilege," etc., duly rendered by the honorable the third judicial district court of Jefferson in suit No. 1938 on the docket of that court, and signed on the 29th of April, 1861; the judgment "In the matter of the Board of Commissioners of the Second Draining District praying," etc. duly rendered by the honorable the third district court of New Orleans and signed on the 9th of February, 1861; the judgment "In the matter of the City of New Orleans praying for a decree of mortgage privilege," etc. upon property in the third draining district (said city acting as subrogee under said act No. 30 of the legislature of the session of 1871) duly rendered by the eighth district court, parish of Orleans and signed on the 4th day of May, 1872; and the judgment "In the matter of the board of administrators praying for a recognition and recovery of assessments in the fourth draining district" (said board of administrators herein also acting as transferee and subrogee under said act No. 30 of 1871) duly rendered by the superior district court parish of Orleans, in suit No. 807 on the docket of said court on the 29th day of January, 1873, and signed on the 3d day of February, 1873, copies of which judgments are herewith filed and made part hereof and marked "A," "B," "C," "D," "E."

And your orator further shows that under the authority conferred by said acts the board of commissioners of the first draining district on the 12th day of September, 1861, levied an assessment of $3\frac{3}{10}$ mills per superficial foot on the lands within said district to pay the cost of drainage directed by said acts; that on the 11th of March, 1861, the board of commissioners of the second draining district levied

an assessment of two mills per superficial foot on the lands of said district to pay said costs of drainage of said lands under the
149 same authority; that on the 11 of June, 1872, the board of administrators of the city of New Orleans, then vested with the power to make assessments by virtue of said act No. 30 of 1871, levied an assessment of two mills per superficial foot on all the lands within said third district to pay the said costs of draining said lands; and or or about the 20th of November, 1872, the said board of administrators in the exercise of the authority conferred by said act No. 30 of 1871 levied an assessment of two mills per superficial foot on lands within the aforesaid fourth draining district to pay the expenses of draining the same. All of which will more fully appear by reference to the resolutions of said boards of commissioners, and ordinances of the common council of said city of New Orleans, as transferee of said boards of commissioners, copies of which are herewith filed and made part hereof and marked respectively, "assessment 1," "assessment 2," "assessment 3" and "assessment 4."

And your orator further shows that the tableau or assessment-rolls exhibiting the amounts assessed for such drainage, the names of the owners of the lands as known, and where unknown stating the owners to be unknown, were duly filed in the courts hereinafter named, in accordance with the provisions of the acts of the legislature of the State of Louisiana, and on motion and after due publication of said orders, that all persons concerned show cause why such assessments should not be approved and homologated, said tableaux or rolls of assessment were duly homologated and approved by the judgments of said courts, which, by the terms of said act No. 57 of 1861, were and are now judgments against the aforesaid lands, as well as the owners thereof, for the amounts assessed and 10 per cent. costs and counsel fees; and said judgments, the titles of the proceedings, the courts rendering the same and the dates of rendition, are as follows, to wit:

"In the matter of the Commissioners of the *First* Draining District, praying," etc., No. 29935 superior district court, parish of Orleans; the judgment homologating the assessment-rolls for said district was rendered on the 21st of March, 1874, by said superior district court for the parish of Orleans.

"In the matter of the Commissioners of the *Second* Draining District, praying," etc., No. 1938, the judgment homologating the assessment-roll of said district *above* Toledano street was rendered by the second judicial district court for the parish of Jefferson, on the 15th and signed on the 23d March, 1869.

"In the matter of the Commissioners of the *Second* Draining District praying," etc., No. 25393, the judgment homologating the assessment-rolls of said district *below* Toledano street was rendered by the *third* district court for the parish of Orleans on 11th, and signed on the 18th November, 1868.

"In the matter of the Commissioners of the Third Draining District praying," the judgment homologating said assessment-roll for said district was rendered on the 8th and signed on the 13th November, 1872, by the eighth district court for the parish of Orleans.

"In the matter of the Board of Administrators praying," etc., No. 807, the judgment homologating the assessment for the *fourth*
150 draining district was rendered on the 15th and signed on the 18th of March, 1873, by the superior district court for the parish of Orleans; said tableaus or assessments are specially referred to for fuller explanation and greater certainty, and copies of said judgments are herewith filed and made part hereof, and marked "A 1," "B 1," "C 1," "D 1" and "E;" all of said courts so rendering said judgments having become possessed of jurisdiction over said matters under authority conferred on them by the State of Louisiana subsequent to said act No. 57 of 1861.

And your orator further shows that said board of administrators of the city of New Orleans complied with said act No. 30 of 1871, and took possession of all the money, rights, privileges, properties and powers conferred on them and became possessed of the means necessary to carry out the objects of the statutes aforesaid, and provide for the payment of all the drainage warrants that might be issued under said act No. 30 of 1871.

And your orator further shows that said Mississippi and Mexican Gulf Ship Canal Company and Warner Van Norden (who became subsequently the transferee of said company and who had been duly recognized as such by the legislature of the State of Louisiana prior to the issuance of the drainage warrants sued on by your orator and reduced to judgment as hereinafter stated) proceeded under the authority conferred under said act No. 30 of 1871 with said drainage work, excavated canals, built protection levees and provided and ran all the machinery necessary for the full and complete accomplishment of the work and generally did and performed all that was required of them by said act until June, 1876, by which time fully two-thirds or more of the work contemplated by said act No. 30 of 1871 and as designated thereunder by the board of administrators of the city of New Orleans had been completed, and received from said city of New Orleans in pursuance of the provisions of said act No. 30 of 1871 warrants payable out of said taxes, assessments and judgments for a very large sum (the amount of which is unknown to your orator) and for the payment of which all of said taxes, assessments and judgments and other assets were expressly pledged.

And your orator further shows that he is the holder and owner of a certain judgment based on three of the above-named drainage warrants issued under and in pursuance of the above act No. 30 of 1871 for work and labor done by the said Mexican Gulf Ship Canal Company and said W. Van Norden, transferee thereof under the provisions of said act, and measured and accepted by said city of New Orleans for the sum of two thousand dollars each, numbered 115, 116 and 122 and all dated July 9, 1875, with interest at eight per cent. per annum from date, and each of which was legally and formally issued by J. G. Brown the then administrator of public accounts of the said city of New Orleans, for the amount of money therein set forth, and each of said warrants was on the day of the date thereof presented to Edward Pilsbury, the then administrator of finance of said city of New Orleans, and said

presentation was by him acknowledged in writing, and the
151 same were legal contract obligations of the said city of New Orleans, to pay the amount thereof and the interest therein stipulated, and which warrants were respectively made payable to the order of said W. Van Norden, transferee of the said Mexican Gulf Ship Canal Company, who endorsed the same, whereby they became negotiable and transferable by delivery, and as such your orator acquired the same, and said W. Van Norden was at the time of the institution of the suit in which said judgment was rendered, and now is, a citizen of the State of New York and could then and now maintain an action on said warrants in this honorable court for the recovery of the amount thereof; which judgment was rendered in suit No. 10810 on the docket of this honorable court and entitled James W. Peake *vs.* The City of New Orleans, on the 9th day of May, 1887, upon which execution issued on the — day of ——, 1887, which was after due demand on defendant by the marshal of this hon. court returned by him *nulla bona*, as will more fully appear by reference to the record of said suit, judgment, execution and return thereon, and all made part hereof.

And your orator further shows that in the contract made by the State of Louisiana for the city of New Orleans with the Mexican Gulf Ship Canal Company as embraced in said act No. 30 of 1871, there was a direct and positive trust and obligation imposed on said city of New Orleans to collect said drainage taxes, assessments and judgments at that time outstanding and due and to make assessments of two mills per superficial foot in those parts of said three draining districts theretofore created, and on such other lands as should be brought within the protection levees contemplated by said act where no assessments had been made and to collect the same and place all such collections to the credit of said Mississippi and Mexican Gulf Ship Canal Company, to be applied only to the drainage of New Orleans and Carrollton, which obligations and trust said city of New Orleans assumed and accepted and thereby guaranteed and warranted to perform all the said obligations and duties imposed on her by said act and especially said duty of placing all of said collections to the credit of said Mississippi and Mexican Gulf Ship Canal Company and applying the same solely to the drainage of New Orleans and Carrollton.

And your *your* further shows that said city has collected said drainage taxes, assessments and judgments to a very large amount from various parties owing the same, but the amount thereof and the names of the parties from whom the same were collected are unknown to your orator, but disregarding her duties and obligations and warranties aforesaid has applied a very large amount of said collections to purposes not contemplated by said act No. 30 of 1871, and in violation thereof, and among others as follows:

First. The sum of $18,699.66 set forth in detail in exhibit marked "account No. 1" not one cent of which was ever placed to the credit of said Mississippi and Mexican Gulf Ship Canal Company or paid in accordance with any of the provisions of said act No. 30 of 1871 although collected thereunder.

Second. Three thousand dollars paid in January, 1874, to
152 James J. O'Hara, whose relations with said city are set forth in the document herewith filed and made part hereof and marked "contract 1," and which was paid under a certain compromise made between said O'Hara and said city of New Orleans, a certified copy whereof is filed herewith and marked "compromise 1."

Third. Five hundred dollars paid about January, 1874, to P. E. Boyer, transferee of the firm of H. & C. Tyler, for coal for running the draining machines of the city of New Orleans, which it was declared in said act No. 30 of 1871 should be run by said city of New Orleans.

Fourth. Seven thousand five hundred and two $\frac{57}{100}$ dollars collected by said city as attorneys' fees in the third draining district, which it was decided in the case of Lacy *vs.* Waples and The City of New Orleans (28 La. Ann., p. 158) belonged to said city of New Orleans as part of said drainage fund, and of which sum three thousand and fifty-three $\frac{80}{100}$ dollars has been illegally and improperly paid out by said city on the dates and to the parties specified in exhibit hereto annexed and made part hereof and marked "account No. 2," leaving a balance due to the credit of said account which should be paid to your orator and parties similarly situated.

Fifth. Ten thousand dollars and upwards, the precise amount not being known to your orator, collected by said city as attorneys' fees in the first draining district and paid out as such to Geo. S. Lacy and others who rendered said services as city attorneys, and who in accordance with the above decision in Lacy *vs.* Waples *et al.*, were not entitled to such fees, but the same belonged to said city as part of the drainage fund created by the acts hereinbefore referred to.

And your orator further shows that said city of New Orleans, from the 27th day of July, 1872, to the 9th of January, 1873, collected in cash in said first draining district $1,546.03; in said second draining district $3,398.85; and in said third draining district $1,939.95 making a total of $6,884.83 of drainage taxes collected during said time for which said city released and discharged the individuals and lands against which the same were levied and assessed, which she never deposited or placed to the credit of said Mississippi and Mexican Gulf Ship Canal Company and never paid out for any purposes contemplated by said act No. 30 of 1871, and with which she is now chargeable with interest from the date of collection.

And your orator further shows that from December 31, 1873, up to June 3d, 1881, said city of New Orleans in utter disregard of the obligations imposed on her as aforesaid and without any authority whatever therefor received in full payment and satisfaction of drainage, taxes, assessments and judgments imposed and rendered as aforesaid, drainage warrants, amounting to $214,440.95 a full and detailed account whereof is set forth in exhibit herewith filed and marked "account No. 3" for which amount said city is chargeable with interest.

And your orator further shows that by the purchase by the city

of New Orleans on the 7th day of June, 1876, of the boats,
153 franchises and property of said Mexican Gulf Ship Canal Company and its transferee, as hereinafter described, said city of New Orleans in her corporate and municipal capacity became the absolute owner and proprietor of said property so purchased and held and owned it for the sole use and benefit of said city and was thereafter in duty bound to continue said drainage work, dig canals and build protection levees until said drainage was fully completed, and collect the taxes, assessments and judgments out of which all of said drainage warrants were to be paid, free of any claim or charge whatever therefor which fact was so well recognized and understood at the time of said purchase, that there was a provision incorporated in said act of sale, providing a bureau of drainage should be created with an office in the city hall at New Orleans with a book-keeper at a salary of $200 per month and a collector at a salary of $300 per month payable out of drainage assessments and 2½ per cent. commissions on the amounts of taxes collected out of which said collector was to pay all attorneys' fees, costs, expenses, clerk hire and stationery and to the obligations of which said Van Norden, transferee as aforesaid individually and as a holder of drainage warrants undertook to bind all warrants so held by him as will more fully appear by reference to said act of sale hereinafter described.

And your orator further shows that under the terms of the above stipulation in said act of sale and transfer said city of New Orleans has paid W. T. Mayo, book-keeper a sum exceeding twenty-four thousand dollars and to James B. Guthrie a sum exceeding twenty-five thousand dollars, and your orator shows that the warrants upon which his aforesaid judgment is based had passed from the possession and control of said Van Norden long prior to the date of said sale and transfer of June 7, 1876, and the same were not bound, nor is your orator's said judgment based thereon bound by any stipulation in said agreement (and your orator is informed and believes that all of said warrants issued for work done, performed and accepted by said city of New Orleans, amounting to $325,000 and upwards were also at the date of said sale and transfer, not held or controlled by said Van Norden) and as to this class of warrants which were all issued and dated prior to said sale and transfer, and any and all judgments based thereon, said payments to said Mayo and to said Guthrie, were illegal and improper and said city is bound to account to the holders of said class of warrants and judgments based thereon for said payments so made to said Mayo and Guthrie as aforesaid.

And your orator further shows that he is informed and believes there are many more cases of unauthorized payments and waistings of said drainage fund but the dates and parties to whom paid are at present unknown to him as will more fully appear by reference to a compromise thereof attempted to be made by said city and said Van Norden in said act of sale of June 7, 1876, and hereinafter referred to as aforesaid.

And your orator further shows that by act No. 16 of the legislature of Louisiana approved February 24, 1876, and made part hereof,

the city of New Orleans was authorized and empowered, to contract with said Mississippi and Mexican Gulf Ship Canal Company
154 and said W. Van Norden, transferee thereof for the purchase of its rights and said Van Norden's rights, franchises, tools, implements, machines, boats, and apparatus, the purchase price to be paid in drainage warrants payable out of drainage assessments imposed under previous acts, and on the 7th day of June, 1876, said purchase was made, by notarial act, a copy of which, as well as of the inventory of the goods sold is herewith filed and made part hereof, and marked "transfer 1" and "inventory 1," the said city receiving from said company and its transferee said machines, boats, and apparatus and implements of great value, for which it agreed and bound itself to pay $300,000 in drainage warrants with $20,000 additional in pretended compromise of misappropriation of funds as aforesaid to be enforced and collected by said city of New Orleans, which warrants were accordingly delivered to the said Van Norden, transferee as aforesaid, and ever since said city has had possession and enjoyment of said property, wholly disregarding its obligations to pay for the same, as is more fully stated hereafter; that by such act the city of New Orleans assumed entire charge of said drainage work, undertook to carry it on. Avail itself of the work done by said company, which in compliance with all of its obligations had dug and excavated canals and built levees and performed services requisite to said drainage work up to the time of said sale and transfer on said 7th day of June, 1876, when from two-thirds to three-quarters of all the work contemplated by said act No. 30, of 1871, and as designed thereunder by the board of administrators of New Orleans, had been completed; that the work so *due* by said company and its transferee was in all respects conformable to the acts of the legislature and the designs and directions of said board of administrators and was adequate to secure the drainage proposed, requiring of course proper efforts on the part of the city of New Orleans to maintain the work already done, and to go on and prosecute the same to its final completion, which it became its sole right and duty to do after said sale and transfer as aforesaid; and all of said drainage warrants issued as aforesaid for actual work and labor done by said company and measured, approved and accepted by said city of New Orleans, and all judgments based thereon are first entitled to the benefits of and to be paid out of said assessments, liens, privileges, mortgages and judgments and especially the judgments against the city of New Orleans hereinafter specially described, and next, all of said warrants issued for said property bought received and enjoyed by said city but not paid for, and all judgments based on said last-named warrants are entitled to the benefit of and to be paid out of said assessments, liens, privileges, mortgages and judgments aforesaid.

And your orator further shows, that all of said warrants were in the same form, except as to amounts and dates, and were negotiable, were secured by all said drainage assessments and judgments, pledged for their payment and by the obligations of the city of New Orleans imposed by law, as well as by the express assumption of

said city to collect and apply the funds derived from all of said drainage assessments and judgments therefor, to the payment
155 of all of said warrants in the order aforesaid and on the faith of said obligations of the city of New Orleans and of these securities your orator for actual value given by him therefor acquired the warrants hereinbefore described and upon which your orator's aforesaid judgment is based as aforesaid.

And your orator further shows that he is informed and believes there are now outstanding for work actually done, measured and accepted by the city of New Orleans, warrants exceeding in amount $325,000, which are in addition to the above $320,000 issued for the purchase of the franchise tools, etc., as aforesaid.

And your orator further shows that the decrees of the court aforesaid subjecting the lands to be drained to the first-mortgage lien and privilege to secure said assessments assessed for drainage, and homologating said assessment-rolls, constituting personal judgments against the owners of the land as well as against the land for the amounts assessed have been duly recorded in the office of the recorder of mortgages of the parishes of Orleans and Jefferson according to the situation of the lands, and within ten years from the rendition and recordation thereof have been reinscribed, and are mortgages against the lands and the owners thereof to secure said assessments; and proceedings have been instituted in the State courts by the city of New Orleans as transferee and subrogee aforesaid within ten years from the rendition thereof to revive said judgments homologating said assessment-rolls and constituting personal judgments as aforesaid; and in the second draining district for the parish of Jefferson said judgment was at the suit of the City of New Orleans transferee and subrogee aforesaid duly revived by a judgment of said second judicial district court rendered on the 9th and signed on the 18th day of April, 1879, as will more fully appear by reference to copies of said proceedings made part hereof and filed with "A 1," "B 1," "C 1," "D 1."

And your orator further shows that subsequent to the issue of said warrants and the assumption by the city of said drainage work the legislature of Louisiana passed certain laws to exclude certain lands from all liability for the said assessments, to annul the judgments therefor, cancel all liens, mortgages and privileges securing said assessments, and finally there is incorporated in the present charter of the city of New Orleans an enactment to repeal all the laws for the drainage of said city and forbidding the collection of said drainage assessments, all of which will more fully appear by reference to the acts of the legislature No. 48 of the year 1877, No. 67 of the year 1877 and No. 20, section 42, of the year 1882, all of which are made part hereof, and specially referred to for fuller explanation and greater certainty.

And your orator further shows that the legislative acts under which said warrants issued pledging said taxes, assessments and judgments for their payment were in legal effect contracts under which the holders of said warrants and judgments rendered thereon, were entitled to the benefit of all securities as well as of the fulfill-

ment of the obligations of the city of New Orleans to enforce said taxes, assessments and judgments thereon; that said legis-
156 lative acts, to wit: No 48 of 1877, No. 67 of 1877 and section 42 of act 20 of 1882 propose to liberate the lands, the owners thereof and said city of New Orleans from all liability to the holders of said warrants and judgments based thereon, and to destroy all the securities pledged for the payment of said warrants and judgments based thereon and said acts further propose to discharge said city from all its obligations to pay the price of the property acquired by it under its contract of purchase of the 7th of June, 1876, to be paid out of said drainage assessments and judgments which said city by its contract bound itself to collect and enforce; that in effect these legislative acts design to destroy the right of property of your orator in said drainage assessments and judgments, free all parties from liability, cancel all securities on the lands, and deprive your orator and other parties similarly situated of all means of payment of said warrants and judgments based thereon, created by said city of New Orleans under the pledge of the grant and securities hereinbefore set forth.

And your orator further shows that said legislative acts and each of them are null, void and of no effect, for plain repugnancy to the Constitution of the United States and especially the first article, section 10 and the fifteenth amendment of that instrument prohibiting all legislation impairing the obligations of contracts and protecting the rights of property by which your orator's rights are secured.

And your orator further shows that there *is* now due and uncollected drainage taxes, assessments and judgments exceeding one and a half millions in amount and that the city of New Orleans itself is a judgment debtor for drainage taxes and assessments levied upon lands exhibited on said assessment-rolls for the various drainage districts and duly approved and homologated for the following sums, to wit:

In the first draining district, with interest.....	$223,111 60
In the second draining district for that portion thereon situate in the parish of Jefferson, with interest....	128,454 29
In the second draining district for that portion thereof situate in the parish of Orleans, with interest.	71,431 18
In the third draining district, with interest thereon at six per cent. per annum from May 4, 1872.....	207,441 41
In the fourth draining district, with interest thereon at six per cent. per annum from January 30, 1873..	65,956 00

making in the aggregate six hundred and ninety-six thousand three hundred and ninety-four $\frac{53}{100}$ dollars exclusive of interest, counsel fees and costs allowed by said judgments which is unpaid and should be paid by said city of New Orleans to the satisfaction of your orator's said judgment and drainage warrants outstanding susceptible of being reduced to like judgments and interest thereon, as will more fully appear by reference to duly certified copies of said judgments and extracts from said assessment-rolls *on*ly ap-

proved and homologated by the aforesaid judgments copies
157 of which are herewith filed and marked "A 1," "B 1," "C 1," "D 1," "E 1."

And your orator further shows, that said judgment above set forth for $128,454.29 although rendered against the city of Jefferson, city of Carrollton, and the police jury of the parish of Jefferson, the same became a judgment against the city of New Orleans and a debt due by said city of New Orleans under section 34 of act No. 7 of the legislature of the State of Louisiana approved March 16, 1870, and the fifth section of act No. 7 of the said legislature of said State approved March 21, 1874, as will more fully appear by reference to said acts which are made part hereof.

And your orator further shows that the aforesaid judgments against said city of New Orleans were rendered against her in suits instituted and prosecuted by herself and especially those based on assessments in said first, third and fourth draining districts, and that subsequent to the rendition thereof and in further recognition of the correctness thereof and her liability thereon said city has asked the courts for the revival thereof.

And your orator further shows that since said legislation of 1877 said city of New Orleans has failed to enforce said assessments and judgments neither paying what it owes itself or enforcing the liability due by others, nor has it complied in any manner with its obligations in the premises and shields itself under the illegal and unconstitutional acts aforesaid and said avowal and refusal among others was and is manifested in the ordinance of the council of the said city passed on the 5th of April, 1881, and in the proclamation of the mayor of the said city published April 7th, 8th and 9th, 1881, copies of which are herewith filed and marked ordinance No. 6970 and proclamation No. 1 and made part hereof.

And your orator further shows that among those who appeared and opposed the homologation of the assessments in the first draining district (which had been levied long prior to said act No. 30 of 1871, but which were approved and homologated thereunder) was the estate of John Davidson, but after due hearing said assessment-rolls were duly approved and homologated as aforesaid (see 27 Ann., p. 20 to 24), made part hereof and the judgment of the supreme court in that matter was duly affirmed by the Supreme Court of the United States (96 U. S. R., p. 69) and thereafter, and after said sale and transfer from said Mississippi and Mexican Gulf Ship Canal Company and said W. Van Norden, transferee, and after said city of New Orleans had failed and declined to go on and complete said drainage work, and after she had allowed some of the *drainage*-boats so purchased as aforesaid to sink and rot, and had sold others, and thus rendered herself unqualified to complete the same, and publicly announced her determination not to do so, said estate of said John Davidson brought suit to have the aforesaid judgments against it annulled and set aside and said judgment in March, 1882, was annulled on the ground that the same was prospective and based upon benefits to be rendered, that said benefits had not up to

the time of the institution of said suit been rendered but injury
158 had been done in consequence of the work as far as done, that the city of New Orleans had abandoned all drainage work and disposed of all drainage apparatus and become incompetent to resume said drainage enterprise and that therefore there was a failure of consideration of said judgment which rendered it inequitable and unjust to enforce the same (see 34 Ann., p. 170 to 178, made part hereof.)

And your orator further shows that the area of land to be reclaimed and drained under act No. 30 of 1871, embraced all the lands in the three draining districts described in said act No. 165 of 1858, and such additional lands as were brought within the limits of the protection levees contemplated by said act No. 30 of 1871, and this territory, under said act as an entirety was to be drained and protected as follows, to wit: By a canal 50 feet wide and 15 feet deep to be dug from a point on the Mississippi river above Carrollton to Lake Pontchartrain, then along the shore of said lake to the lower limits of the city of New Orleans, and thence from said lake shore to the Mississippi river below said city, and with the earth removed from said canal, a protection levee was to be built on the outside of said canal one hundred feet wide at its base and of sufficient height to protect the land within the same from overflow, the said canal and protection levee together with the levee on the bank of the Mississippi river, to form a complete protection from overflow of the lands within said limits; and said canal, on the inside of said protection levee, to serve as a reservoir for the drainage of New Orleans, and lands in the rear of said city, into which other canals contemplated by said act and located by said —, were to empty; and from said reservoir canal the water was to be lifted and pumped into said Lake Pontchartrain by engines, drainage machines and apparatus to be placed, built and run by said city of New Orleans and at her expense, the whole constituting one entire system of drainage, the real benefits and advantages of which could only be realized by the completion of the entire system; which canals, protection levees, and other canals contemplated by said act were to be and were located by said board of administrators of said city, and are exhibited on the map herewith filed and made part hereof, and marked "drainage map No. 1."

And your orator further shows that more than two-thirds of the work of said drainage system was completed at the time of the purchase of said city on June 7, 1867, as aforesaid; the canal and protection levee, from the Mississippi river above Carrollton to the shore of Lake Pontchartrain, and along said lake to the bank of the new canal at West End on said lake had been completed, as was also the canal and protection levee below said city of New Orleans, and about all the canals within the above area of territory had been dug and the old canals cleaned and deepened, leaving only to be built the canal and protection levee from West End to the point where said lower canal and protection levee joined the shore of said Lake Pontchartrain, and the pumps and apparatus to be bought placed in position and run by said city of New Orleans.

And your orator further shows that after said city became the owner of said franchise, boats and implements, and thus
159 above authorized and fully equipped to complete said system of drainage as an entirety, according to the plan thereof, she wholly disregarded her duties and obligations, and declined and refused to proceed with said work, sold some dredge-boats, tools and apparatus bought as aforesaid, and allowed others to rot as aforesaid, and suffered the work already done to remain useless and go to destruction by neglect, and your orator avers that the sole cause for the lack of the benefits conferred on said property of said Davidson's estate and damage thereto if any, and the sole ground for said Davidson decision was the refusal and neglect of said city to complete said system as an entirety and build and run the engines and apparatus to remove said drainage water from said reservoir canal, that the territory aforesaid might be fully and completely drained and protected from overflow, and she alone is responsible for said decision and the loss of the amount of said judgment which with interest thereon amounted to eighty thousand dollars and upwards, and is chargeable therewith and accountable to your orator and other holders of judgments based on said drainage warrants and warrants susceptible of being reduced to like judgments.

And your orator further shows that he is informed and believes that very numerous other decisions have been rendered by the courts of Louisiana based on the same facts and grounds as the above Davidson decision (but the titles to the suits and the amounts therein involved are at present unknown to your orator) whereby very numerous drainage assessments and judgments based thereon have been annulled and set aside and the lands and the owners thereof released and discharged from all liability and all due to the fault, neglect and refusal of said city of New Orleans to complete the drainage work aforesaid whereby very large sums of money have become wholly lost to your orator and others similarly situated and for all of which and for all loss, waste and damages resulting from the non-fulfillment of its duty as aforesaid said city is accountable. To the end therefore that it may be adjudged that the said acts of the legislature of Louisiana, to wit: No. 48 of 1877, No. 67 of 1877 and section 42 of act No. 20 of 1882 are unconstitutional, null and void, that an account may be taken of all the drainage taxes, assessments and judgments imposed and rendered under acts No. 165 of March 18, 1858, No. 191 of March 17, 1859, No. 57 of March 1st, 1861, and No. 30 of 1871, and the various acts of the legislature supplementary thereto and amendatory thereof and of all moneys collected by said city of New Orleans under the aforesaid acts; and of any and all other assets and property that came to said city of New Orleans under the aforesaid acts or any of them as well as of each, any and all payments, disbursements and dispositions thereof; and that a further account be taken of all the loss, waste and damage caused by said city of New Orleans of or to said drainage taxes, assessments and judgments by reason of its illegal and wrongful acts of administration of the duties and obligations imposed on it under the above-named acts of the legislature, to wit: No. 165 of 1858, No.

191 of 1859, No. 57 of 1861, and No. 30 of 1871 or any of them or by its failure to observe and carry out said obligations, or from any other cause, and that the sum found to be due on said
160 accounting with interest, may be decreed to be paid to your orator and other parties similarly situated who may avail themselves of the benefit of these proceedings and may offer to pay their share of the costs, expenses and counsel fees herein, and that your orator and said other parties similarly situated may have judgment against said city of New Orleans for the sum so found to be due as aforesaid, and that your orator may have such other and further relief and redress or both as may be proper and just in the premises:

May it please your honors to grant unto your orator a writ of subpœna issuing out of and under the seal of this honorable court, directed to the city of New Orleans therein and thereby commanding said city of New Orleans on a day certain therein to be named and under a certain penalty to be and appear before this honorable court then and there to answer, but without oath, which is waived, all and singular the premises, and to stand to, perform and abide such order, direction and decree as may be meet and agreeable to equity and good conscience, and your orator as in duty bound will ever pray.

(Signed) RICHARD DE GRAY,
ROBERT MOTT,
Solicitors for Complainant.

Answer.

Filed March 19, 1888.

Circuit Court of the United States, Eastern District of Louisiana.

JAMES W. PEAKE
vs.
CITY OF NEW ORLEANS. } No. 11614.

This defendant, now and at all times hereafter, saving and reserving to itself all and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties and imperfections in the said bill contained, for answer thereto, or to so much thereof as this defendant is advised, it is material or necessary for it to make answer to, answering, says:

1. That in the year 1858, the legislature of Louisiana passed an act, being act No. 165 of that year, entitled "*An act to provide for the leveeing, draining and reclaiming of swamp lands in certain portions of the parishes of Orleans and Jefferson.*"

That in the year 1859, the legislature of Louisiana passed an act (being act No. 191 of that year) entitled:

"An act supplementary to an act entitled, 'An act to provide for the leveeing, draining and reclaiming swamp lands in certain portions of the parishes of Orleans and Jefferson,' approved March 18, 1858."

That in the year 1861 the legislature of Louisiana passed an act being act No. 57 of that year) entitled:

"An act to provide for the collection of assessments made under."

161 That the object of these acts was to provide for the drainage of the lands described and bounded in them, and to that end they created boards of commissioners to determine on and supervise the carrying out of the drainage works in the three districts into which the said lands were divided, authorize said boards to levy an assessment or tax on the lands to be drained; and provided how said assessment or tax should be made a first mortgage and privilege on said lands, and how it should be collected.

All of which will more fully appear by reference to said acts as printed by authority in the acts for the years 1858, 1859 and 1861.

2. That said act No. 57 of 1861 directed that when the said boards of commissioners had levied a drainage tax of so many mills per square foot, they should prepare a roll, showing the persons and property assessed and the amount assessed against each. That after due notice given of the preparation of this roll, and exposure thereof for inspection certain designated courts should on application of said board render a judgment homologating said rolls, and that this judgment of homologation should have the effect of a judgment against said property and the owners thereof. But that it was not intended that said judgment of homologation should have the force of a general personal judgment against said owners, but only that it should have the force and effect of a judgment against the owners, restricted in execution to the particular property assessed.

3. That in 1871, the legislature of Louisiana passed an act (being act No. 30 of that year) entitled

"An act to provide for the drainage of New Orleans."

That in this act it was provided that the Mississippi & Mexican Gulf Ship Canal Company should, for a remuneration fixed in said act, construct the drainage works therein indicated and such other drainage works as should be fixed by the board of administrators of the city of New Orleans.

That said act further provided that for work done thereunder by said company and measured and accepted by the said board of administrators, warrants should be issued on the administrator of finance. That said administrator of finance should pay these warrants on presentation thereof to him, if he then had any money to the credit of said company; and that if he had no money to its credit, then the date of presentation should be endorsed on said warrants, and they should thereafter bear 8 per cent. per annum interest until paid.

That the said act further provided, that in order to secure a fund for the payment of said drainage works, the assets of the former boards of drainage commissioners, including the assessments and assessment-rolls, made by them, and judgments in their favor, as also their claims against the city, should be transferred to said board of administrators. And said board of administrators were directed to collect the balance due on the levies and assessments made by said boards of commissioners, and to levy an assessment

on the lands comprehended under said act, but not included under former acts. And the money thus collected was to be held by
162 said board of administrators to the credit of said company, and for the payment of the above-mentioned warrants.

Respondent shows, however, that the provisions in said act, which were afterwards construed to invest the said board of administrators with the powers conferred by said act 57 of 1861 on the boards of commissioners were unconstitutional and void if they were intended to have that effect, and that the pretended judgments of homologation mentioned in complainant's bill herein as obtained by said board of administrators under the said act 57 of 1861, were null and void, and so held and decreed in the matter of Miss. & Mexican Ship Canal Co. *vs.* City of New Orleans, 35 An., p. 68; and by virtue and effect of this judgment the complainants are barred from claiming any relief in this proceeding by reason of said assessment and judgment and defendant hopes it may have the benefit of this defence as if it had availed itself thereof in the form of a plea to the same.

Respondent further shows that under none of the acts hereinbefore mentioned was any authority conferred on the board of commissioners, or on the board of administrators, to assess the city of New Orleans on its streets and public places, and that all assessments for drainage against said city on its streets and public property, were null and void.

Respondent further shows that the said Mississippi and Mexican Gulf Canal Company accepted the terms of said act 30 of 1871 and began work thereunder. That under said act 30 of 1871, the said company was entitled to look for payment for work done only from the fund therein provided; and that said fund embraced nothing beyond the drainage assessments legally made under said act and the uncollected balances of drainage assessments legally made under the act of 1858, above referred to. And your respondent further shows that no validity or force ever attached to ordinance 1359 adopted February 7, 1872—the same was null and void and so declared by the supreme court of Louisiana in the cases known as Succession of Irwin and others 35 An., p. 68, and also in 33 An. and 34 An., p. 97.

Respondent further shows that for all work done by said company, under said act 30 of 1871, and measured and accepted by said board of administrators up to January 1st, 1875, the said company was paid in full either in cash or by exchange of the drainage warrants issued under said act 30 of 1871, for seven per cent. gold bonds of the city of New Orleans issued under act 73 of the legislature of Louisiana for the year 1872.

Respondent further shows that in 1872 the legislature of Louisiana passed an act (being act No. 73 of that year) entitled "An act to authorize the council of the city of New Orleans to levy a police tax" and for other purposes set forth in its title.

That under the 13th section of said act, the city of New Orleans was authorized to fund drainage warrants issued under act 30 of 1871 into 7 per cent. bonds of the said city. That said act 73 of

1872 did not purport to create any new indebtedness by the
163 city of New Orleans, but only to provide for the funding of its existing indebtedness; that said act therefore, did not impose upon the city of New Orleans as its debt, the entire cost of the drainage done under said act 30 of 1871; that the utmost which can be claimed is that said act may be construed as recognizing as a debt of the city of New Orleans, the till then utterly invalid and void assessments made against said city on its streets and public places; and that if said act did impliedly recognize and validate such previously invalid assessments against the city, it provided that the same might be paid and discharged by the issuance, in exchange for drainage warrants, of the bonds mentioned in said act.

Respondent further shows that under said act bonds of the city of New Orleans, of the face value of one million six hundred and sixty-five thousand dollars were issued to said Mississippi & Mexican Gulf Canal Company and its transferee Warner Van Norden, in exchange and as payment for drainage warrants issued to said company or to said Van Norden. That by the issuance and acceptance of said bonds in exchange and as payment for said warrants, the city of New Orleans paid more than double the amount assessed against it; that by such overpayment the drainage fund became indebted to the city of New Orleans for at least the difference between the amount assessed against said city and the total sum paid.

Respondent further shows, that it is wholly immaterial whether the assessments against the city of New Orleans were or were not marked on the rolls or elsewhere, as paid, when said bonds were issued in exchange for said drainage warrants; that in fact the issuance and acceptance of said bonds in exchange for said warrants, did more than pay and discharge the indebtedness of the city on account of said drainage assessments, if any such indebtedness ever in fact existed.

Respondent further shows, that it is not true that it has misapplied any money or sums whatever collected by it from the drainage assessments; that all money and sums *whether* collected by it from said drainage assessments have been applied in the manner directed by law.

Respondent further shows that by the constitutional amendment of the State of Louisiana of the year 1874, which went into effect on January 1, 1875, the city of New Orleans was prohibited from in any manner, directly or indirectly, increasing its indebtedness, and was also forbidden to issue any more drainage warrants, except payable out of drainage taxes, and not otherwise.

That said act No. 16 of 1876, which purported to authorize the city of New Orleans to buy on credit, the drainage plant and implements, etc., of Van Orden, was null and void, as in contravention of said constitutional amendment.

Respondent further shows that all the drainage warrants now outstanding, were issued subsequent to January 1st, 1875, and are payable in terms as well as under the law, solely out of drainage taxes.

Respondent further shows that after the constitutional amendment of 1874, the said city of New Orleans was without authority to render itself liable for drainage warrants issued subsequent

164 to January 1, 1875, and could not, either with or without the sanction of the legislature, enter into any contract which could directly or indirectly make the city liable for such warrants either by direct assumption or by failure to carry out such contract.

Further answering respondent shows that the said city of New Orleans has done all in its power to collect said drainage taxes and that the amount now outstanding and uncollected, was uncollectible. That if said uncollected taxes had been collected and paid to the holders of outstanding warrants, there would have been nothing left to carry on the drainage work with; and that if said collections had on the other hand been applied to the continuance of the drainage works, then there could have been nothing to pay the outstanding warrants with. That plaintiff's complaint that respondent has not proceeded with the work is therefore unfounded, as respondent has not been provided with funds to continue said work; and further your respondent says that the right, title and interest of said Van Norden as transferee of the said Miss. & Mexican Gulf Canal Co. was declared null and void and in fraud as shown by the decree and judgment of the supreme court of Louisiana and referred to in 33 An., p. 804. That the property pretended to have been conveyed and sold by said Van Nordon *were* seized and sold by creditors of said Co. in suits of Willard and others as your respondent will show.

Respondent further shows that it has strenuously endeavored to collect all the unpaid balances on said drainage-assessments rolls, and has exhausted all the remedies open to it in the effort to collect it; that the expenses of salaries to agents and book-keepers and other officials, and other expenses in collecting said taxes, were legitimate and proper expenses and were properly charged against the collections made.

Respondent finally shows that if through error of officials any portion of the collections made by it have been misapplied, which is denied, then such sum or sums are much more than compensated by the overpayments made by the city, by overissue of its bonds as hereinbefore stated, and that the result of an accounting will be to show that the drainage fund is largely in debt to the city of New Orleans.

And this respondent denies all and all manner of unlawful combination or confederacy, wherewith it is by the said bill charged, without this, that there is any other matter, cause or thing in the complainant's said bill of complain*ant* contained, material or necessary for this respondent to make answer unto, and not herein, well and sufficiently answered, traversed and avoided or denied, that is true, to the knowledge or belief of this defendant; all which matters and things this defendant is willing and ready to aver, maintain and prove, as the court shall direct, and respectfully prays to be hence dismissed with costs.

(Signed) W. H. ROGERS,
City Att'y for Defendant.
WHITE & SAUNDERS,
H. H. HALL,
For B'd Liquidation.

165 *Subpœna in Chancery.*

Issued November 26, 1894.

UNITED STATES OF AMERICA:

The President of the United States to the marshal for the eastern district of Louisiana, Greeting:

You are hereby commanded to summon the City of New Orleans to appear before the honorable the judges of the fifth judicial circuit of the United States of America, at a circuit court to be holden on the first Monday of January, 1895, then and there to answer a bill in chancery, filed against it, wherein John G. Warner is complainant and said City of New Orleans is defendant.

Herein fail not, and have you then and there this writ, with your endorsement thereon how you have executed the same.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, this 26th day of November, in the year of our Lord one thousand eight hundred and ninety-four, and the 119th year of American Independence.

[SEAL.] (Signed) E. R. HUNT, *Clerk.*

The defendant is hereby notified that it is required to enter its appearance in the clerk's office of the United States circuit court, on or before the first Monday of January, 1895, otherwise the bill may be taken *pro confesso.*

(Signed) E. R. HUNT, *Clerk.*

Marshal's Return.

Received by U. S. marshal, New Orleans, November 26, '94, and on the 28th day of same month I served copy hereof on the City of New Orleans, La., by handing the same to Hon. John Fitzpatrick, mayor thereof, in person, in the said city of New Orleans, La.

(Signed) J. V. GUILLOTTE,
U. S. Marshal,
By JOHN EARLY,
Dep. U. S. Marshal.

Appearance.

Extract from the Chancery Order Book.

MONDAY, *January* 7, 1895.

JOHN G. WARNER
vs.
CITY OF NEW ORLEANS. } 12350.

Now comes the defendant herein, through E. A. O'Sullivan, city attorney, and Branch K. Miller, solicitors, and enters its appearance to the complainant's bill of complaint.

(Signed) E. A. O'SULLIVAN,
City Attorney,
By B. K. MILLER,
BRANCH K. MILLER,
Solicitors for Defendant.

166 *Demurrer.*

Filed February 4, 1895.

U. S. Circuit Court, Eastern District of Louisiana.

JOHN G. WARNER
vs.
CITY OF NEW ORLEANS. } No. 12350.

The demurrer of The City of New Orleans, defendant, to the bill of complaint of John G. Warner, complainant.

This defendant by protestation, not confessing or acknowledging all or any of the matters in and by the said bill of complaint set forth and complained of to be true in the manner and form as the same are therein, and thereby set forth, and alleged, says:

That it is advised, that there is no matter or thing contained in the complainant's bill of complaint, good and sufficient in law, to call this defendant to account in this honorable court for the same; but that there is good cause of demurrer thereunto; and it does demur thereunto accordingly, and for causes of demurrer to the said complainant's bill of complaint, in case the same were true, which this defendant denies, and in no way admits, contains not any matter of equity whereon this court can ground any decree, or give the complainant any relief or assistance against it, this defendant, particularly for this:

That as appears by the bill of complaint and exhibits filed therewith, the complainant, as the assignee or transferee of Warner Van Norden, sues to recover the amount claimed to be due by the city of New Orleans, to the said Van Norden, as assignee or transferee of the Mississippi and Mexican Gulf Ship Canal Company, and to other holders of drainage warrants under the contract of said company by legislative act to drain the said city, and under an act of purchase, by which it is claimed that the city of New Orleans became liable to said Van Norden in his capacity of assignee or transferee of the said company, for the amount of the drainage warrants on which he sues; that complainant suing as assignee or transferee of said Van Norden, of rights and actions claimed to have been acquired by him as assignee or transferee, of the Mississippi and Mexican Gulf Ship Canal Company, this suit cannot be maintained; that the said company being a corporation created by the laws of the State of Louisiana, and a citizen thereof, was, and is, incompetent to sue the city of New Orleans, also a citizen of the State of Louisiana, if no such assignment by the said company had been made; the acts of Congress defining and limiting the jurisdiction of this court, forbidding all suits in this court by assignees or transferee unless the original assignor or transferror, in this case the Mexican Gulf Ship Canal Company, could have brought this suit in this court.

And for further cause of demurrer, this defendant shows,
167 that as appears by complainant's bill of complaint, all the warrants mentioned and referred to in said bill, and the payment of which the bill seeks, were drawn by the city of New Orleans a municipal corporation, and a citizen of the State of Louisiana, to be satisfied from and out of the drainage taxes, directed by the aforesaid legislative act to be levied for the purpose, and are payable to the said Mississippi and Mexican Gulf Ship Canal Company or to its order, or to the said Warner Van Norden, in his capacity of assignee or transferee of the said company, as shown by the said bill and exhibits and the form of warrant filed with complainant's bill and sued on by him; that no suit on any such warrants, whether by said Van Norden as assignee or transferee of said company, or by other holders of any such warrants by transfer or assignment of said company or otherwise, could be maintained in this court, if no assignment or transfer of such warrants and of the rights and choses in action of said company, had been made by the same, the assignor or transferror of said Van Norden, and such other holders of such warrants; the said company being at all times a citizen of the State of Louisiana, and the city of New Orleans, the drawer of said warrants, sought to be charged, being likewise a citizen of the State of Louisiana, jurisdiction of this suit by an assignee and transferee, and for other alleged assignees and transferees claiming to have acquired the rights of said company under assignments to them, being excluded by the acts of Congress.

And for further cause of demurrer, if any is necessary, this defendant shows that none, or all, of the matters and things alleged in complainant's bill of complaint, show any basis for this suit, as has been adjudged finally by this court in the suit of J. W. Peake *vs.* The City of New Orleans, No. — of the docket thereof; and as has been affirmed on appeal, by the Supreme Court of the United States, as will appear by the decision of that court, in said cause or suit, in volume 139 of the United States Reports, page 342, and the following, in which said Peake sought a judgment against defendant on the same grounds, matters and things alleged in the instant bill; and the said decisions were that the same furnished no cause or ground of complaint, or suit against this defendant.

And for further cause of demurrer, this defendant says, that complainant's bill of complaint is framed on the theory that the city of New Orleans undertook to complete the system of drainage directed by the said legislative act; that if the same had been completed complainant, the aforesaid holder of drainage warrants would have been paid; that the bill charges that the work was abandoned, and therefore it is averred that the city of New Orleans became liable to said warrant-holders; but this defendant avers that even if the allegations and averments in the said bill in this respect had any foundation, which is not in any manner admitted, but denied, then there is and was no liability of the city of New Orleans, as appears by the bill and exhibits to the said warrant-holders, and as has been adjudged by this court, and by the Supreme Court of the

168 United States in said suit entitled J. W. Peake *vs.* City of New Orleans, which said suit is also referred to in complainant's bill of complaint.

And for further cause of demurrer, this defendant says: that there is no matter or thing contained or set forth in complainant's bill of complaint, good and sufficient in law, to call this defendant to any account, and no matter of equity on which this court can ground any decree, or give any relief.

Wherefore, and for divers other errors and defects in the said complainant's bill of complaint contained, and appearing on the face thereof, this defendant does as aforesaid demur in law thereunto, and humbly craves the judgment of this honorable court, whether it is compellable, or ought to make any answer thereunto, otherwise than as aforesaid; and this defendant humbly prays to be hence dismissed with its costs and charges in this behalf most wrongfully sustained.

(Signed) BRANCH K. MILLER,
Solicitor for Defendant.
E. A. O'SULLIVAN,
City Attorney, Solicitor for Defendant.

I hereby certify that in my opinion the above demurrer is well founded in law.

(Signed) BRANCH K. MILLER,
Solicitor for Defendant.
E. A. O'SULLIVAN,
City Attorney, Solicitor for Defendant.

Affidavit.

Personally appeared John Fitzpatrick, mayor of the city of New Orleans, who being duly sworn, deposes and says, that he is the mayor of the city of New Orleans, and that the above demurrer is not interposed for delay.

(Signed) JOHN FITZPATRICK,
Mayor City of New Orleans.

Sworn to and subscribed before me this 4th day of February, 1895.

[SEAL.] (Signed) FRANK H. MORTIMER,
U. S. Commissioner.

Demurrer Set Down for Argument.

Extract from the Chancery Order Book.

WEDNESDAY, *Feb'y* 6, 1895.

JOHN G. WARNER
vs. } 12350.
CITY OF NEW ORLEANS.

Now comes complainant through Richard De Gray of counsel and sets down for argument the demurrer herein filed Feb'y 4, 1895.

169 *Order Fixing Demurrer.*

Extract from the Minute Book, November Term, 1894.

NEW ORLEANS, THURSDAY, *February* 7, 1895.

Court met, pursuant to adjournment.
Present: Hon. Charles Parlange, district judge.

JOHN G. WARNER
vs.
CITY OF NEW ORLEANS. } No. 12350.

On motion of Richard De Gray of counsel for the complainant, it is ordered that the demurrer herein filed by the defendant be fixed for trial on Saturday, February 9, 1895, at 11 a. m.

Hearing and Submission of Demurrer.

Extract from the Minute Book, November Term, 1894.

NEW ORLEANS, SATURDAY, *February* 9, 1895.

Court met, pursuant to adjournment.
Present: Hon. Charles Parlange, district judge.

JOHN G. WARNER
vs.
CITY OF NEW ORLEANS. } No. 12350.

This cause came on to be heard upon the demurrer herein filed by defendant.

Richard De Gray and Rouse & Grant appearing for complainant.

Branch K. Miller for the defendant in support of the demurrer and was argued and submitted—when the court took time to consider.

Decree.

Entered and filed February 26, 1895.

United States Circuit Court, Eastern District of Louisiana.

JOHN G. WARNER
vs.
CITY OF NEW ORLEANS. } No. 12350.

This cause came on to be heard at this term upon the demurrer herein filed by defendant, The City of New Orleans, to the bill of complaint and was argued by counsel and submitted:

On consideration thereof it is ordered, adjudged and decreed that the said demurrer of defendant be sustained and the bill of complaint dismissed at the costs of the complainant.

(Signed) CHARLES PARLANGE, *Judge.*

New Orleans, Feb-uary 26, 1895.

170 *Motion and Order for Appeal.*

Entered and filed March 4, 1895.

United States Circuit Court, Eastern District of Louisiana.

JOHN G. WARNER
vs.
CITY OF NEW ORLEANS. } No. 12350.

On motion of Richard De Gray, and John G. Rouse and William Grant, solicitors for complainant, and on suggesting to the court that there is error in the final decree of this court rendered and signed of the 25th day of February, 1895, to the prejudice of said complainant and that he desires to appeal therefrom, the assignment of errors this day filed being duly considered,

It is ordered in open court, that complainant be allowed an appeal from said decree with supersedeas returnable to the United States circuit court of appeals for the fifth circuit, within thirty days from the date of the entry hereof upon furnishing bond conditioned according to law in the sum of two hundred and fifty dollars with good and solvent security.

(Signed) CHARLES PARLANGE, *Judge.*

March 4, 1895.

Assignment of Error.

Filed March 4, 1895.

United States Circuit Court, Eastern District of Louisiana.

JOHN G. WARNER
vs.
CITY OF NEW ORLEANS. } No. 12350.

Assignment of errors.

And now comes complainant and assigns the following errors in the decree of this hon. court dated February 25th, 1895, dismissing complainant's bill of complaint with costs:

1st. The circuit court erred in maintaining the defendant's demurrer and in dismissing complainant's bill.

2nd. The circuit court should have decided that the city of New Orleans voluntarily entered into the contract of sale passed before Gustave Legardeur, Jr., notary public, on the 7th day of June, 1876, and thereby became liable to pay the drainage warrants given for the purchase price of the property therein and thereby acquired without qualification, at least to the extent of the drainage taxes assessed upon streets and squares for which she was then a debtor in the sum of $696,394.30, and the court erred in deciding otherwise, and dismissing the bill.

171 3rd. The act of the legislature of the State of Louisiana approved February 24th, 1876, was a special designation and appropriation of the drainage taxes as they then stood on the records of the mortgage offices of the parishes of Orleans and Jefferson to the payment of the drainage warrants authorized to be issued in payment of the price of said purchase; and the said contract of sale of June 7th, 1876, made pursuant thereto, covenanted and warranted the existence of said drainage taxes without impairment as they stood on said date on said records, and the court erred in deciding to the contrary.

4th. The defendant claims as a defense to this action, that at the time she entered into said contract and acquired property of the value of $300,000, in exchange for drainage warrants payable out of the drainage fund, she had already discharged her own indebtedness to that fund, as well as all liability for any neglect or failure to collect the taxes due on private property, by the previous issue and delivery of bonds of the drainage series, issued under act No. 73 of the year 1872, to an amount in excess of the whole drainage assessments applicable to the payment of said purchase warrants. It was error to maintain this defense.

5th. The defendant having confessed by its demurrer that it had not at any time prior to entering into said contract of purchase claimed she had been discharged from said indebtedness and liability to the drainage fund by the issuance and delivery of said bonds, and that Warner Van Norden the vendor had no knowledge that any such claim existed or would be made as a defense to the payment of the purchase warrants and would not have made the sale if he had been aware that such pretense would be put forward, the court erred in dismissing the bill.

6th. The court erred in not maintaining the estoppel pleaded in this behalf to the bill.

7th. The voluntary contract made by defendant to pay the warrants out of drainage funds which could only be realized by completing the drainage plans or system, or collecting the taxes already assessed, carried with it an implied covenant that if the city failed or neglected to do this, that she would pay the same from other sources. The court erred in holding otherwise.

8th. It was a fraud on the vendor in said contract of sale for the city of New Orleans to agree to pay the price out of a fund which she knew was wholly inadequate, if her own indebtedness to that fund had already been discharged, and that fact was not disclosed and made fully known to the vendor; and the circuit court erred in holding to the contrary.

9th. At the time of the sale on the 7th day of June, 1876, the total amount of drainage taxes then outstanding and uncollected, was $1,469,714.47, of which $696,394.30 was due by the city of New Orleans, and $773,320.17 by individuals, and at said time the total amount of bonds of the "drainage series" previously issued and delivered under act No. 73 of the year 1872, was $1,672,105.21, or $202,390.74 more than the total amount of drainage taxes at said

time outstanding, and in view of these facts it was error for the
172 court, after the delivery to and acceptance by the defendant of the property purchased, which it has never returned or offered to return, to allow said defendant to set up any claim or offset to said drainage taxes then outstanding on the drainage record; or any of them, to the prejudice of the warrants given for said purchase, such claim being moreover in direct contravention of the covenant contained in said act of sale, not to devote said drainage taxes to any other purpose than the payment of the warrants then outstanding.

10th. The court erred in not distinguishing the present suit from the suit of Peake *vs.* New Orleans, reported in the 139 U. S. R. page 342 and following, and especially in that it did not recognize the fact that the present suit is based on a different obligation, to wit: on drainage warrants given for the purchase of the franchise, machinery, tools, dredge-boats, franchise, etc., purchased under and pursuant to special authority of the legislature of the State of Louisiana granted by an act approved February 24th, 1876; and did not further recognize the fact that the present suit is based on an assignment from said Van Norden to complainant of all his rights, and rights of action against said city of New Orleans, set up in the bill and in said assignment filed therewith and marked, "assignment 1;" and farther that it did not recognize the fact that the relation of the city of New Orleans under said act of February 24th, 1876, toward the drainage fund was changed from that of compulsory and involuntary trustee, to that of voluntary and contractural trustee, and that the duties created by and under said act approved February 24th, 1876, were duties and obligations placed directly on the municipality of New Orleans, instead of, on the board of administrators, as was provided by act No. 30 of the year 1871.

11th. The circuit court being of opinion that the bill of complaint could not be maintained because a receiver had been appointed, should have dismissed the bill "without prejudice," and it was error to dismiss the bill without this qualification.

(Signed) RICHARD DE GRAY,
J. D. ROUSE,
WILLIAM GRANT,
Solicitors for Complainant.

Bond for Appeal.

Filed March 5, 1895.

Know all men by these presents that we, John G. Warner, as principal, and John W. Castles, of New Orleans, Louisiana, as surety, are held and firmly bound unto the City of New Orleans in the full and just sum of two hundred and fifty dollars, to be paid to the said City of New Orleans, her certain attorney, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 4 day of March, in the year of our Lord one thousand eight hundred and ninety-five.

173 Whereas, lately at a session and term of the United States circuit court for the eastern district of Louisiana, in a suit depending in said court between John G. Warner *vs.* City of New Orleans, No. 12350 of the docket of said court, a decree was rendered against the said John G. Warner and the said John G. Warner having obtained an order for appeal, and the same having been entered of record to reverse the decree in the aforesaid suit, and a citation directed to the said City of New Orleans, citing and admonishing her to be and appear before the United States court of appeals for the fifth circuit, to be holden at New Orleans, Louisiana, within 30 days from the date thereof:

Now, the condition of the above obligation is such, that if the said John G. Warner shall prosecute his appeal to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

(Signed) JOHN G. WARNER,
By R. DE GRAY, *Solicitor.* [SEAL.]
JOHN W. CASTLES. [SEAL.]

Sealed and delivered in presence of—
(Signed) H. J. CARTER.

Approved by—
(Signed) CHARLES PARLANGE, *Judge.*

UNITED STATES OF AMERICA:

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana.

CLERK'S OFFICE.

I, Edward R. Hunt, clerk of the circuit court of the United States, for the fifth circuit and eastern district of Louisiana, do hereby certify, that the foregoing 280 pages contain and form a full, complete, true and perfect transcript of the record and proceedings had, together with all the evidence adduced on the trial of the case of John G. Warner *vs.* The City of New Orleans, No. 12350 of the docket of the said court.

Witness my hand and the seal of said court, at the city of New Orleans, this 19th day of March, A. D. 1895.

[SEAL.] E. R. HUNT, *Clerk.*

I, Charles Parlange, United States judge for the eastern district of Louisiana, do certify, that Edward R. Hunt, whose name is signed to the above certificate as clerk of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, was, at the time of signing said certificate, and is now the clerk of said court. That said certificate is in due form of law, and that full faith and credit are due to his official attestations as such clerk.

Given under my hand, at the city of New Orleans, in said district this 19th day of March, A. D. 1895.

CHARLES PARLANGE, *Judge.*

(Endorsed:) Filed March 20, 1895. J. M. McKee, clerk.

174 *Proceedings in United States Circuit Court of Appeals for the Fifth Circuit.*

November Term, 1894.

TUESDAY, *April* 23, 1895.

(Extract from the Minutes.)

JOHN G. WARNER
vs.
CITY OF NEW ORLEANS. } No. 364.

This cause came on to be heard this day and was submitted to the court after argument by Mr. Richard De Gray and Mr. Wm. Grant for appellant and by Mr. Branch K. Miller for appellee, with leave to both parties to file additional briefs within five days from this date.

November Term, 1895.

TUESDAY, *May* 14, 1895.

(Extract from the Minutes.)

JOHN G. WARNER
vs.
THE CITY OF NEW ORLEANS. } No. 364.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the eastern district of Louisiana and was argued by counsel.

Whereupon, the court desiring the instruction of the honorable the Supreme Court of the United States for the proper decision of the questions arising herein—

It is ordered that the following statement and questions of law be certified to said Supreme Court, to wit:

The complainant, a citizen of the State of New York, filed his bill in said circuit court against the City of New Orleans, alleging substantially as follows:

"By act approved March 18, 1858, the legislature of the State of Louisiana undertook to provide for draining and reclaiming portions of the parishes of Orleans and Jefferson. The work was to be accomplished through boards of drainage commissioners appointed for each of the three districts into which the territory was divided.

The funds to pay for work were to be raised as follows: Whenever the several boards were prepared to drain their districts they were required to cause a plan to be made of the proposed work, designating its subdivisions and the names of the proprietors of the land, &c. This plan was to be filed in the mortgage office, of which notice was required to be published once a week for four consecutive weeks. At the expiration of the notice the boards were to apply

to a court specified in the act, which was required to decree that
175 the district was subject to a first-mortgage lien and privilege for such an amount as might be assessed upon the property. After the tax had been levied the court was authorized to render judgment against the several property-owners for the amount due by them.

By another act approved March 17, 1859, the boards were authorized to issue bonds to the extent of $300,000 for each district for the purpose of carrying on the work, redeemable out of drainage taxes.

By an act approved March 1, 1861, the boards were authorized to apportion the amount which each tax-payer should be required to pay yearly to meet the annual interest and instalments due on the bonds. Other and more stringent provisions for the collection of these taxes were also made in the act, such as authorizing judgments to be rendered against the tax-payer and his property and the issuance of execution as in ordinary cases. The boards of commissioners for the first and second districts filed plans of the work they proposed to do and obtained judgments decreeing the lands in those districts to be subject to liens and privileges for the proposed work; they levied assessments payable in installments and obtained judgments for the amount of the rolls, and some money was collected thereon.

By act 30 of 1871 the several boards of drainage commissioners were abolished and the work of drainage was transferred to the Mississippi and Mexican Gulf Ship Canal Company, but the board of administrators of the city of New Orleans, for all other purposes, was made their successor and was subrogated to all moneys, assessments, and other assets then belonging to them, and was required to collect such tax and assessments and to make and collect an additional tax of two mills per superficial foot on all lands where no tax had been levied, for drainage purposes, and that all collections from these sources be placed to the credit of said Mississippi and Mexican Gulf Ship Canal Company and held as a fund to be applied only to the drainage of the city of New Orleans and Carrollton.

By the 8th section of the act it was made the duty of the administrator of accounts to draw a warrant on the administrator of finance against this fund for the payment of amounts due for all work done by that company.

The board of administrators entered on the duties imposed on them under this act, procured the mortgages and liens to be decreed, assessments to be levied, and judgments to be rendered for he taxes assessed in the third and fourth drainage districts.

The whole amount of assessments that came under their administration was $1,699,637.37, and of this $1,003,342.28 was assessed against individuals, and $696,394.30 against the city of New Orleans on the area of her streets and squares.

The work was continued under this act until 1876 by Warner Van Norden, who had become transferree of the said Mississippi and Mexican Gulf Ship Canal Company. He excavated some

176 5,000,000 cubic yards of earth and completed two-thirds of the plan of drainage when act No. 16 of February 24, 1876, was passed for the purpose of authorizing the city of New Orleans to assume exclusive control of all drainage work, and, if she desired it or deemed it advisable, to purchase from said canal company and its transferree, Van Norden, all the tools, boats, and apparatus pertaining to drainage work, and the franchise of the compppny, upon an appraisement to be made by appraisers to be appointed by the city council. The act further provided that the price should be paid by the city of New Orleans in drainage warrants in the same form and manner as those theretofore issued under act 30 of 1871.

Pursuant to this act the city council caused the property to be appraised. The valuation was fixed at $300,000.00, and on the 7th of June, 1876, a formal act of sale and transfer was executed between Warner Van Norden and said canal company and said city of New Orleans, by which the former made a transfer of the drainage plant and franchise for said amount payable in drainage warrants, and the city covenanted "not to obstruct or impede, but on the contrary to facilitate, by all lawful means, the collection of drainage assessments, as provided by law, until said warrants have been fully paid, it being well understood and agreed by and between said parties thereto that collection of drainage-tax assessments should not be diverted from the liquidation of said warrants and expenses, under any pretext whatsoever, until the full and final payment of the same."

Up to the date of this sale the city had collected on the assessment against private property $229,922.89, leaving $1,469,714.47 outstanding and uncollected, of which amount the city owed $696,394.30 as assessee of the streets and squares.

The drainage warrants issued prior to December 31, 1874, had been paid or taken up before said sale by the issue of bonds of the "drainage series," to the amount of $1,672,105.21, under authority of act 73, approved April 26, 1872. The 13th section of this act, after providing for the issue of said bonds, further provided that "all taxes collected for drainage and not required for payment of drainage warrants, shall be devoted to the purchase, from the lowest bidder, of bonds issued for drainage."

Complainant sues on three of the drainage warrants of $2,000.00 each, given for the purchase price of the drainage plant and franchise sold to the city of New Orleans, as above set forth.

The bill, after setting out the foregoing state of facts in more amplified form, avers (1) that the city of New Orleans, after she became possessed of the drainage franchise, sold some of the drainage machinery and suffered the rest to become rotten and valueless, and abandoned all work of drainage; that by reason of the non-completion of the drainage system the supreme court of Louisiana decided the drainage taxes could not be collected, inasmuch as no benefit had been conferred on the property; (2) that the city by various means impeded the collection of drainage taxes, and by her conduct, ordinances, and proclamations encouraged and induced

the people to refuse to pay the assessments, by reason whereof the drainage assessments due by private persons have become
177 valueless; (3) that the city will plead that she has been discharged from all liability to account for the drainage taxes she has collected or which she ought to have collected, but has wasted, as well as her own indebtedness, by the issuance and delivery between May 10, 1872, and December 31, 1874, of drainage bonds, under authority of the act 73 of 1872; (4) that the city had never claimed prior to the purchase of said property and franchise that the issuance of said bonds operated as such discharge, and made no such plea, save in the case of James W. Peake *vs.* The City of New Orleans, filed March 19, 1888; (5) that the act of 1876 was an authority for the city to make said purchase, as well as a legislative recognition that said drainage fund had not been discharged by the issue of said bonds, and was an appropriation and dedication of so much thereof as was necessary to pay the purchase warrants without offset or impairment; (6) that the contract of sale was entered into by Van Norden in consideration of the provisions of said act of 1876, and its effects on his rights and remedies; that neither at the time of entering into the contract of sale nor when the warrants were delivered in discharge of the price did the city disclose to him that she would claim the issuance of said bonds as a discharge of her liability to account for and apply the drainage taxes, including those due by herself, to the payment of said purchase warrants; that he was ignorant that the city would claim such discharge, and would not have entered into said contract if he had been advised that any such claim would be made as aforesaid; that Van Norden has expressly, and by writing annexed to and made part of the bill, subrogated complainant to all his rights and remedies growing out of said sale (R., p. 145); the complainant therefore avers that the city is estopped in equity and good conscience from pleading or maintaining such defense.

The bill closes with a prayer for an accounting of said drainage fund, and especially that the amount due by the city as assessee of the streets and squares be decreed to be a trust fund in the hands of the city, applicable to the payment of said drainage warrants.

Defendants demurred to the bill, especially asserting that the decision in the case of James W. Peake *vs.* The City of New Orleans, reported in 139 U. S., 342, is decisive of the issues in this case. The demurrer having been sustained by the circuit court, the complainant has removed the case to this court for review, assigning, among others, errors in this respect.

And it appearing that the suit of said Peake was based on drainage warrants given for work, all dated July 9, 1875, complainant insists that they were issued while the city was an involuntary and non-contractual trustee, and in this respect differ from those involved in this case, which were issued by the city as voluntary and contractual trustee under the permissive authority of the legislature, and that both on principle and owing to the estoppel pleaded in the bill, his rights are not affected by said decision.

The case having been argued in this court on the errors assigned,

and this court desiring the instruction of the honorable the
178 Supreme Court for the proper decision of the questions arising herein touching the matter of estoppel aforesaid and the application of the decision of the Supreme Court to the issues involved in this suit, it is ordered that the following questions and propositions of law be certified to the Supreme Court in accordance with the provisions of section 6 of the act entitled "An act to establish circuit courts of appeal and define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891, to wit:

First.

Is the city of New Orleans, under the warranties, express and implied, contained in the contract of sale of June 7, 1876, by which she acquired the property and franchise from Warner Van Norden, and under the averments of the bill, estopped from pleading against the complainant the issuance of bonds to retire $1,672,105.21 of drainage warrants issued prior to said sale as a discharge of her obligation to account for drainage funds collected on private property and as a discharge from her own liability to that fund as assessee of the streets and squares?

Second.

Should the decision in the case of James W. Peake *vs.* The City of New Orleans, 139 U. S., p. 342, be held to apply to the facts of this case and operate to defeat the complainant's action?

It is further ordered that a copy of the printed record and the several acts of the legislature, together with copies of the briefs on file in this court, be sent to the honorable the Supreme Court with the transcript certifying the aforesaid questions.

Mandate from Supreme Court.

UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the fifth circuit, Greeting:

Whereas lately, in the said United States circuit court of appeals, before you or some of you, in a cause between John D. Warner, appellant, and The City of New Orleans, appellee, wherein certain questions arose, which were certified under the seal of said United States circuit court of appeals to the Supreme Court of the United States for its opinion, as by the inspection of the certificate of the said United States circuit court of appeals, which was brought into the Supreme Court of the United States agreeably to the act of Congress in such case made and provided, fully and at large appears;

And whereas in the present term of October, in the year of our Lord one thousand eight hundred and ninety-six, the said
179 cause came on to be heard before the said Supreme Court on the said certificates and was argued by counsel:

On consideration whereof it is the opinion of this court that the first question certified must be answered in the affirmative.

Whereupon it is now here ordered by this court that it be so certified to the said United States circuit court of appeals.

MAY 24, 1897.

You, therefore, are hereby commanded that such further proceedings be had in said cause, in conformity with the opinion of this court, as according to right and justice and the laws of the United States ought to be had, the said certificate notwithstanding.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 29th day of May, in the year of our Lord one thousand eight hundred and ninety-seven.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

(Endorsed:) Filed May 31, 1897. J. M. McKee, clerk.

United States Circuit Court of Appeals, Fifth Circuit, November Term, 1896.

THURSDAY, *June* 10, 1897.

(Extract from the Minutes.)

JOHN D. WARNER
v.
CITY OF NEW ORLEANS. } No. 364.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the eastern district of Louisiana and was argued by counsel.

On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said circuit court in this cause be, and the same is hereby, reversed and this cause remanded to said circuit court, with instructions to overrule the demurrer to the complainant's bill and thereafter proceed as equity and good conscience may require.

It is further decreed that the appellee, The City of New Orleans, be condemned to pay the costs of the appeal in this cause, for which execution may be issued out of said circuit court.

180 *Opinion.*

Filed June 10, 1897.

United States Circuit Court of Appeals, Fifth Circuit, November Term, 1896.

JOHN G. WARNER, Appellant,
vs.
CITY OF NEW ORLEANS, Appellee. } No. 364.

Appeal from the circuit court of the United States, eastern district of Louisiana.

Before Pardee and McCormick, circuit judges, and Bruce, district judge.

By the COURT:

The City of New Orleans, under warranties, express and implied, contained in the contract of sale of June 7, 1876, by which she acquired the property and franchise from Van Norden, and under the averments of the bill, is estopped from pleading against the complainant below and appellant here the issuance of bonds to retire $1,672,105.21 of drainage warrants issued prior to said sale as a discharge of her obligation to account for drainage funds collected on private property and as a discharge from her own liability to that fund as assessee of the streets and squares. Warner *v.* City of New Orleans, 167 U. S., p. 467.

On the case made by the bill of complaint the decision of the Supreme Court in the case of James W. Peake *v.* The City of New Orleans, 139 U. S., 342, does not necessarily apply to the facts of this case nor operate to defeat the complainant's action. It follows that the circuit court erred in sustaining the demurrer to the complainant's bill.

The decree of the circuit court is reversed and the cause is remanded, with instructions to overrule the demurrer to the complainant's bill and thereafter proceed as equity and good conscience may require.

U. S. Circuit Court of Appeals for the Fifth Circuit.

JOHN G. WARNER
versus
CITY OF NEW ORLEANS. } No. —.

To the honorable the judges of the circuit court of appeals for the fifth circuit:

The petition of The City of New *New* Orleans, defendant in error, respectfully prays for a rehearing in this case, on the following grounds, to wit:

First. That the opinion of your honors proceeds upon the theory

that the only issue involved is whether or not the city is
181 estopped from pleading, in discharge of the liability sought to be fixed upon her in this suit, her issue of bonds to the amount of $1,600,000 described in the bill; whereas, there are other questions raised by the demurrer, which have not been considered or disposed of by the court.

Second. That this case is governed by the principles laid down by the Supreme Court of the United States in Peake *vs.* New Orleans, 131 U. S., 247; that if effect be given by your honors to the doctrine of that case, the demurrer filed in this suit should be sustained; that the effect and bearing of the Supreme Court's decision in the Peake case upon this suit is not treated of in the opinion of your honors, except so far as it may concern the issue by the city of its bonds aforesaid.

Filed Jun- 19, 1897.
J. M. McKEE, *Clerk.*

Third. That under the amendment of the constitution of the State of Louisiana, proposed and adopted in 1874, the city in no event could become a debtor for any of the drainage warrants sued upon in this case, as the city by the said amendment was prohibited, after the first of January, 1875, from increasing its debt in any manner or form, or on any pretext; that the city was not a debtor of any of the said warrants prior to the first of January, 1875, and could, by no act of commission or omission, subsequent to that date, become such debtor.

Your honors are respectfully requested to consider the briefs filed in support of this application.

BRANCH K. MILLER,
Solicitor of Defendant in Error.

I hereby certify that the above and foregoing application for a rehearing in this case is, in my opinion, well founded in law.

BRANCH K. MILLER,
Solicitor for Defendant in Error.

United States Circuit Court of Appeals, Fifth Circuit, November Term, 1896.

THURSDAY, *June* 24, 1897.

(Extract from Minutes.)

JOHN G. WARNER
v.
CITY OF NEW ORLEANS. } No. 364.

Ordered that the petition for rehearing filed in this cause be, and the same is hereby, denied.

182 United States Circuit Court of Appeals, Fifth Circuit, November Term, 1897.

JOHN G. WARNER
v.
CITY OF NEW ORLEANS. } No. 691.

Be it remembered that heretofore, to wit, on the 12th day of March, 1898, a transcript of the record of the above-entitled cause from the circuit court of the United States for the eastern district of Louisiana was filed in the office of the clerk of the United States circuit court of appeals for the fifth circuit, and is in the words and figures following, to wit:

Mandate.

Filed July 1, 1897.

UNITED STATES OF AMERICA, *ss*:

[SEAL.] The President of the United States of America to the honorable the judges of the circuit court of the United States for the eastern district of Louisiana, Greeting:

Whereas, lately in the circuit court of the United States for the eastern district of Louisiana, before you, or some of you, in a cause between John G. Warner, complainant, and The City of New Orleans, defendant, wherein a decree was rendered on the 26th day of February, 1895, as follows, to wit:

"JOHN G. WARNER
v.
CITY OF NEW ORLEANS. } No. 12350.

This cause came on to be heard this term upon the demurrer herein filed by the defendant, The City of New Orleans, to the bill of complaint, and was argued by counsel and submitted.

On consideration whereof, it is ordered, adjudged and decreed that the said demurrer of defendant be sustained and the bill of complaint dismissed at the cost of the complainant.

(Signed) CHARLES PARLANGE, *Judge.*"

As by the inspection of the transcript of the record of the said circuit court, which was brought into the United States circuit court of appeals for the fifth circuit by virtue of an appeal sued out by John G. Warner, agreeably to the act of Congress, in such case made and provided, fully and at large appears:

And whereas, in the present term of November, in the year of our Lord one thousand eight hundred and ninety-six, the said cause came on to be heard before the said United States circuit court of appeals, on the said transcript of record, and was argued by counsel:

On consideration whereof, it is now here ordered, adjudged and

decreed by this court that the decree of the said circuit court
183 in this cause be and the same is hereby reversed and this cause remanded to said circuit court with instructions to overrule the demurrer to the complainant's bill, and thereafter proceed as equity and good conscience may require.

It is further decreed that the appellee, The City of New Orleans, be condemned to pay the costs of the appeal in this cause, for which execution may be issued out of said circuit court.

JUNE 10, 1897.

You, therefore, are commanded that such further proceedings be had in said cause as according to right and justice, and the laws of the United States, ought to be had, the said appeal, notwithstanding.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 1st day of July, in the year of our Lord one thousand eight hundred and ninety-seven.

(Signed) J. M. McKEE,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

(Indorsed:) No. 12350. United States circuit court of appeals for the fifth circuit. No. 364. November term, 1896. John G. Warner *vs.* City of New Orleans. Mandate.

Clerk's Cost Bill.

Attached to mandate.

United States Circuit Court of Appeals, Fifth Circuit.

JOHN G. WARNER *vs.* CITY OF NEW ORLEANS. } No. 364.

Clerk's costs.

Docketing cause and filing record	$5.00	
Transfer to subsequent docket 2 appearances	.50	
Filing 24 papers	6.00	
Filing briefs for appellant	5.00	
Filing briefs for appellee	5.00	
Entering — orders	XV	
Entering submission	.20	
Entering certificate	1.00	
Certificate to Sup. Court	8.40	
Fil. 23 additional papers	5.75	
Fil. brief on rehearing	5.00	
Ent'g judg't	1.00	
Mandate	5.00	
		47.85

184	Att'y's docket fee $20 in Sup. Court $20.....	$40.00	
	Cost of printing record	256.58	
Cost in Sup. Court.....		108.05	
			404.63
Total.....			$452.48

Taxed by
(Signed) J. M. McKEE, *Clk.*

Decree on Mandate of Court of Appeals.

Entered and Filed July 1, 1897.

United States Circuit Court, Eastern District of Louisiana.

JOHN G. WARNER
vs.
CITY OF NEW ORLEANS. } No. 12350.

On motion of R. De Gray and Rouse & Grant, solicitors for complainant in the above-entitled cause, and upon their suggestion, that the final decree rendered herein on the 29th day of February, 1895, has been reversed by the United States circuit court of appeals for the fifth circuit, as will more fully appear by the mandate of said court presented herewith.

It is now ordered, that said mandate be filed and in accordance with the directions therein contained, that the decree of this court dated Feb. 29th, 1895, sustaining defendant's demurrer and dismissing complainant bill, be now set aside and annulled, and that the said demurrer be overruled.

It is further ordered, that defendant plead to, or answer said bill on or before the 15th day of September, 1897, and that defendant pay the costs of appeal.

New Orleans, La., July 1, 1897.
(Signed) CHARLES PARLANGE,
U. S. Judge.

Amendment to Bill.

Filed September 3d, 1897.

United States Circuit Court, Eastern District of Louisiana.

JOHN G. WARNER
v.
CITY OF NEW ORLEANS. } No. 12350.

To the honorable the judge of the circuit court of the United States for the eastern district of Louisiana:

John G. Warner, complainant in the above-entitled cause, humbly showeth:

That he filed his bill of complaint in this honorable court on the

26th day of November, 1894, and that the demurrer of the
185 defendant was lately overruled, and that defendant was ordered to plead or answer to said bill on or before the 15th of September, 1897, but hath not yet pleaded.

Now petitioner is advised that it is proper for him to make certain amendments to his said bill and prayer thereto which are submitted herewith.

Wherefore petitioner prays he may have leave to file the amendments herewith presented; and he prays for such other orders as may seem meet to your honors.

(Signed) RICHARD DE GRAY,
ROUSE & GRANT,
Solicitors for Complainant.

Let the amendments submitted herewith be filed as prayed, and let the defendant plead thereto within the time in which defendant is required to answer the original bill, to wit: on or before September 15, 1897.

New Orleans, Sept. 3d, 1897.

(Signed) CHARLES PARLANGE,
U. S. Judge.

United States Circuit Court, Eastern District of Louisiana.

JOHN G. WARNER
v.
CITY OF NEW ORLEANS. } No. 12350.

For amendment to the bill of complaint in the above-entitled cause, after the last word of the 14th clause insert the following:

Your orator further avers that the said warrants owned by him were presented to the then administrator of finance of the city of New Orleans for payment pursuant to law, on the 6th day of June, 1876, but there being no funds at the time to the credit of said Mississippi & Mexican Gulf Ship Canal Company available for the payment thereof said administrator indorsed upon each of said warrants the fact that they had been so presented; by reason whereof interest became due on said warrants from date of presentation until paid at the rate of eight per cent. per annum.

After the last word of the prayer of the bill insert the words, viz:

And your orator specially prays that the defendant in accounting for the taxes for which she is liable in the drainage fund, may be charged with interest thereon at the rate of six per cent. per annum from the date when the several assessments were homologated, and that your orator and other warrant-holders similarly situated may be allowed and decreed interest on the warrants held by them at the rate of eight per cent. per annum from June 6, 1876, until paid.

(Signed) RICHARD DE GRAY,
ROUSE & GRANT,
Solicitors for Complainant.

186 *Marshal's Return.*

Received by U. S. marshal, New Orleans, La., Sept. 4, '97, and on the 7th day of the same month and year I served copy hereof on Branch K. Miller by handing the same to him in person in the city of New Orleans, La.

(Signed) J. V. GUILLOTTE,
U. S. Marshal,
By JOHN EARLY,
Deputy U. S. Marshal.

Answer.

Filed Oct. 30, 1897.

United States Circuit Court, Eastern District of Louisiana.

JOHN G. WARNER
vs.
CITY OF NEW ORLEANS. } No. 12350. In Equity.

The answer of the above-named defendant to the bill of complaint of the above-named plaintiff.

This defendant, saving and reserving to itself, now and at all times hereafter, any and all manner of benefit and advantage of exception, which can or may be had or taken to the complainant's said bill of complaint, for answer thereto, or to so much thereof as this defendant is advised is in any way material or necessary for it to make answer unto, *it* answers and says:

That by the several acts, No. 165 of 1858, "to provide for leveeing, draining and reclaiming swamp lands in portions of the parishes of Orleans and Jefferson," No. 191 of 1859, supplementary to the first act, No. 57 of 1861, "to provide for collection of drainage assessments," etc., and No. 30 of 1871, "to provide for drainage," etc., the last-named act introducing the Mississippi & Mexican Gulf Ship Canal Company that undertook said drainage, the legislature devised a drainage system for the lands specified, all of which is more fully hereinafter set forth, and to said acts special reference is made for fuller explanation and greater certainty.

This defendant avers that the said several acts propounded a system of drainage for the city of New Orleans, the expense of which was to be borne by the owners of the lands drained, to be collected from them by assessments, and, as in all systems of special taxation for local improvements, the assessments were based upon the prospective benefits proposed by the drainage.

That by the earlier of these acts the appointment of commissioners was provided for, for whom the board of administrators of the city of New Orleans were afterwards substituted, by whom plans were to be prepared, exhibiting the lands to be drained, the names of the

owners, and the probable cost of drainage; the plans were to
187 be filed in designated courts, after due notice to the property-owners; the commissioners, and subsequently the administrators, were authorized to levy assessments on such lands for the drainage expenses; the assessment-rolls, like the plans, were to be filed in said courts, and while these assessments, levied in advance, for prospective drainage and benefit to the land, imported no liability if the drainage failed and was of no benefit to the lands, the acts provided that the homologation of the plans, though creating only such provisional liability, should subject the lands to a lien and privilege to secure the cost of drainage, and that the judgments homologating the assessment-rolls, though creating only such conditional liability, should be judgments against the lands and the owners thereof, on which execution might issue.

This defendant further answering, shows that the greater portion of these assessments were made at an early period after the acts of 1858, 1859 and 1861, and many years thereafter a corporation, known as the Mississippi & Mexican Gulf Ship Canal Company, professing to have the means to secure the drainage promised years before, succeeded in procuring the passage by the General Assembly of the State of Louisiana of said act No. 30 of 1871, by which it was authorized to build protection levees around the drainage districts, digging parallel and intersecting canals, properly connected, of the requisite depth, width and capacity, by which it was claimed that the water gathered within the levees could be conducted to a reservoir canal along the shores of Lake Pontchartrain, thence pumped into the lake by pumps and machinery to be furnished and operated by and at the expense of the city of New Orleans, or its board of administrators, and the said act, assuming the practicability of the scheme, not verified by the result, authorized an extension of the drainage districts; that the said act further substituted the board of administrators of the city of New Orleans for the commissioners constituted by the said prior acts, directed the transfer of the drainage tableaux, and office and other records to the said board of administrators, authorized them to levy and collect the assessments, and subrogated them to all the rights of the commissioners; that for the work of the company warrants were to be issued, as was provided by said act, payable, however, only from drainage taxes, and to bear 8% per annum until the taxes should be collected; and this defendant further shows, that the said plans and assessments, without warrant or authority of law, embraced public streets, parks, squares, and other public places or "public things," not subject to taxation or to assessments for local improvements, or to any form of taxation, and as to the assessments of private property, or property owned by private persons, made or to be made, based entirely on the anticipated or prospective consideration, they were resisted by the said owners of private property, on defenses, which were sustained by the courts, of the complete failure of the prospective and anticipated consideration, the commissioners and the company, and its assignee who succeeded it, having failed to accomplish the promised drainage, as will be more fully shown hereafter.

188 And this respondent, further answering, denies that the aforesaid assessments on public streets, parks, squares and other "public things," included in what is termed by the bill of complaint herein "balance due on assessments," are or were ever due and owing by this respondent, and also denies that the said act of 1871, or any other act, confirmed or made exigible such void assessments; and as to the said assessments against private property, or property owned by private persons, they were incapable of enforcement, by reason of the defenses applicable and pertinent to the same by the owners of said property, particularly by reason of the defense of the property-owners that the drainage scheme accomplished or effected no drainage, and conferred no benefit of any character whatsoever upon the property, and save that the act of 1871 directed the collection of such assessments, this defendant denies that they, or what is termed by the bill of complaint the "balance" to be due on the assessments, were due, confirmed or made exigible, or could be made such, by said act, or any other act, owing to the failure of the entire system of drainage, on the successful accomplishment of which the assessments and their collection depended as a condition.

And further answering, this respondent shows and admits, that the said commissioners and the said board of administrators illegally including in said plans prepared and filed by them, said public streets, parks, squares and other public places, and illegally including in said assessment-rolls assessments on said "public things," and illegally extending the said assessments to what the bill terms the fourth drainage district, the law and certain ordinances purporting to create said district being unconstitutional, and null and void, and was so decided by the supreme court of the State of Louisiana in the succession of Patrick Irwin, 33d La. An. Rep., p. 63, prepared and filed the rolls, and made the assessments stated in the bill.

And further answering, this respondent avers, that no judgment of homologation or approval by any court, particularly such as are averred in the bill herein, could exceed, transcend or have any greater effect, than the authority contained in the said several acts, so as to permit or give validity to any assessments or taxes other than those made upon or against private property, or property owned by private persons, nor could they in any manner or to any extent give validity to any assessments made or taxes levied against public streets, parks, public squares, or other "public things," or to create even the color of a charge of liability against the city of New Orleans.

And further answering, this defendant says, that the said judgment- homologating such plans and rolls, do and can give no validity to such assessments on public streets, parks, squares and other "public things," nor do they bind or create any liability against the said owners of private property, if the proposed drainage was not successfully accomplished; and this defendant denies, that such judgments of homologation against the lands or owners, or any of the property therein mentioned save of the conditional character

stated, now are, or ever were, judgments of any force or effect against such lands, property or owners, owing to the complete failure of the anticipated and prospective consideration,
189 on which the assessments and homologations were based; and this defendant shows, that said judgments of homologation, of not the least validity in respect to the aforesaid assessments on public streets, parks, squares, or other "public things," were and are of no force, for the further reason that the drainage was never at any time accomplished.

Further answering, this defendant admits, that the assessments levied by the commissioners first, and later by the administrators, consisting of said illegal assessments of "public things," and of assessments against private property not capable of enforcement, as already set forth, were of the amounts stated in the bill, and this defendant again denies the aforesaid assessments, whether or not included in the homologated rolls, incapable as they were of enforcement against private property, for the causes hereinbefore set forth, and utterly void so far as they bore or purported to bear on or against public streets, parks, squares or other "public things," were ever due or owing, or that there is or was at any time what the bill terms any "balance," or any part thereof, outstanding or in any manner due, or that of the said alleged "balance," there was a single dollar due by respondent on the said public streets, parks, squares, public places or other "public things," exempt from any assessments under the said statutes providing for the same.

And further answering, this defendant shows, that for at least five years after the enactment of the said statute of 1871, the said Mississippi & Mexican Gulf Ship Canal Company for part of the time, and Warner Van Norden, its assignee, for the other part thereof, claimed to have been engaged in the work of drainage they undertook; that the result of their enterprise demonstrated their plans to be fatally defective, and insufficient in every particular; and further answering, this defendant avers, that the canals claimed to have been dug by the said company and its assignee were not sufficient in number, width, depth or capacity, and from defective digging and excavation, improper connection, and other insufficiencies and defects, no water would flow into them, or reach the aforesaid reservoir canal, from which it was the company's plan the water was to be pumped into the lake, and that the levee work claimed to have been done by said company and its assignee was wholly insufficient to afford any protection from overflow, the protection levee in front, with which the said company and its assignee had nothing to do, providing the only protection from overflow, so that there was, respondent avers, on the part of the said company and its assignee, a complete failure of their undertaking to drain the lands, and neither was entitled to any consideration or should have received any warrants for the same, and whether or not the said plans had the indorsement and approval of engineers this defendant has no knowledge, but whether so indorsed and approved or not, failure was the result, and the said company and its assignee, charged with the execution of the said work, are solely responsible for its failure, this defendant

having furnished pumps, labor, machinery and borne the expenses of operating the same, and having done everything required of it by the said act of 1871, and respondent denies that the plan or plans of the company was or were in any manner supplemented by this defendant, and defendant denies the allegation in the bill to the effect that the "plan was well devised, complete and sufficient," in any respect and that if carried out and completed, would have protected the lands from overflow, improved the drainage, and fitted the lands for agricultural, business, residence or any other purposes, but all such allegations in the bill and others to like effect are untrue.

And further answering, this defendant avers, that whether the said company and its assignee dug and deepened canals, as is alleged, and to the extent as is stated in the bill, or handled the yards of earth, or did levee work, as set up in the bill, this defendant has no knowledge, but charges that all the work, whatever it may have been, claimed to have been done by said company or its assignee, was utterly defective, insufficient, and inadequate to secure any drainage of the lands as hereinbefore set forth, and respondent denies to be true the allegations in the bill to the effect that the work from 1871 or at any other time was prosecuted by the said company, or its assignee, or either, with "great vigor," or any vigor at all, and it denies that said work conformed in all or any respects to the requirements of the said statutes and the design of the said board of administrators, and that it was approved or accepted by them, and that the work was adequate or at all adapted to secure the proposed drainage; and this defendant further denies that it required only the completion of a gap at Lake Pontchartrain, and the placing in position of a pump, to complete the system; but each and all of said allegation-, and others to like effect, are untrue, and this defendant avers the fact to be that all of the work of the said company was badly executed, defective, and wholly unsuited for any drainage, and failed to accomplish any, as hereinbefore set forth, and this defendant again affirms.

And further answering, this defendant says, that in 1876, or by the beginning of that year, the work of drainage and levees which had theretofore been attempted by the said company and its said assignee having completely failed, the General Assembly of the State of Louisiana, by act No. 16 of that year, was constrained to dispense with the services of the company and its assignee, and to authorize the purchase by this defendant of the dredge-boats, rights, franchises, and other property of the company, for a price in drainage warrants, delivered to Warner Van Norden, the said assignee, payable only from drainage taxes, and this act was followed by the said purchase from and surrender of the franchises by the said company and its assignee, as shown by the said legislative act and act of purchase, a copy of which is filed with the bill, to which reference is made.

And further answering, respondent shows, that there was no obligation imposed on respondent by the said act of 1871, or that of 1876, or in any manner by law, to the warrant-holders, or to the

payment of warrants, or in any respect to said drainage warrants, save a proper diligence to collect the taxes out of which the same were payable, and apply the collections to their payment, and
191 that this charge imposed by the said legislative act respondent fully performed, and hence there is no basis whatever to hold this respondent liable for assessments against private property or the owners of private property, or for the aforesaid illegal and void assessments on public streets, parks, squares, or other public places or "public things," or for the payment of the drainage warrants issued under the act of 1871 or 1876, or for any other act or conduct of this defendant, under said act of 1871, or that of 1876, or for any cause whatsoever.

And further answering, respondent states, that whether or not complainant is the holder, by assignment or otherwise, of the drainage warrants described in the bill, and issued to Van Norden, or is the transferree or assignee of any other of the pretended claims alleged in the bill, or whether or not he was or is a citizen of the State of New York, this defendant has no knowledge, information or belief, but this defendant denies that the said Van Norden has or ever had any claim whatever against it, on or in respect to said warrants, or any of them, or arising from or out of the said act of 1876, or by reason of the non-completion of the drainage, or the non-collection of the drainage taxes, or in respect to any causes or things whatsoever.

And further answering, this defendant, save and except that the said act of the General Assembly of the State of Louisiana of 1876 directed that the drainage taxes collected be applied to pay the purchase warrants, as well as other warrants, denies that said act was any destination, new or otherwise, of drainage assessments, funds or taxes, as they then stood, to the payment of the purchase price of the dredge-boats and other property, or to the purchase warrants issued to Van Norden, or to any other warrants, or that the said act had the least purpose to give, or that it gave, the least validity to the aforesaid void assessments or taxes on public streets, parks, squares, public places or other "public things," and this defendant denies that a dollar of drainage taxes collected from private property has ever been diverted from drainage-warrant holders.

And further answering, respondent shows, that said act of 1876 neither intended, nor did it impose, any obligation whatsoever on this defendant to the holders of the drainage warrants issued to Van Norden, for the purchase of the said property and franchise, or in respect to drainage taxes and their collection, or to warrant-holders of any character whatsoever, save to account for collections as already stated.

And further answering, this defendant denies, that by the said act of 1876, or any of the stipulations therein contained, this defendant became the voluntary or contractual trustee for the collection of the taxes which the bill claims "to be then due," but which as a matter of fact and law were not due or owing in any sense.

And this respondent further denies, that previous to the said act of 1876, there was imposed on it the duties of trustee, for the collec-

tion and payment of drainage taxes for drainage warrants, or any duty whatever, in respect to said taxes, save to account for col-
192 lections or assessments on private property, but this defendant alleges, that subsequent to said act of 1876, it applied and devoted itself with great diligence, and to the full extent of its ability, to the effort to improve and make serviceable the canals, levees, and other drainage work of the said company and its assigns, and to drain the lands; and this defendant, to aid in the collection of drainage taxes, established a bureau of traffic in the city hall, and the holders of the drainage warrants appointed an agent, who was placed in charge of the same, with the consent and authority of this respondent, to proceed with the collection of the drainage taxes, and who gave such instruction as he deemed judicious as to the collection of such taxes, which were always followed by the officials of this respondent, and besides, respondent did all in its power to prosecute the collection of the same; the services of the attorneys and executive officers of this respondent in this behalf were directed at all times to such collections, and were also entirely at the service of and freely used by the said agent, whenever required, and that they were diligent in their efforts to make such collection; the drainage taxes were extended on the regular tax bills of this respondent, asserted and claimed on every account filed in the courts by administrators, executors, syndics, and persons exercising like authority; that a large proportion of the property assessed for taxes was remote from the inhabited limits of the city, in the swamp, and unavailable for the collection of said taxes, especially under execution, with the said drainage assessments for unaccomplished drainage recorded in the mortgage office; but notwithstanding a great number of executions were issued, whenever, in the judgment of the said agent or the officials of this respondent, they were deemed expedient; and by said modes and others collections were made, and all accounted for, and the wholly untenable proposition, of the bill, is, in effect, that respondent is to be held as guarantor of the residue of assessments and taxes uncollected, which the combined efforts of the aforesaid agent and attorneys and other officials of the city of New Orleans, and the sheriffs of the parish of Orleans, were unable to collect, to a great extent not susceptible of being realized even if the work of drainage had been performed, and which the district courts, as well as the supreme court of the State of Louisiana held could not be enforced; that in May, 1882, the latter court, in the suit of Davidson *vs.* The City of New Orleans, 34th La. An., p. 170, the plaintiff therein being assessed for and contesting a large amount of drainage taxes, held that the same could not be collected or their payment enforced, because of the failure of the consideration of the assessments, namely, drainage not performed, and to that decision reported in 34th La. An., p. 170, special reference is made, and it is prayed to be taken as part of this answer; and this respondent utterly denies the allegations of the bill that said decision was because of or in any manner due to any failure or neglect of duty on the part of this respondent, in respect to drainage or drainage acts, or that there was any such failure or neglect or that the supreme court im-

putes to or intimates any such failure or neglect; but this respondent avers, that said decision was solely because of the com-
193 plete failure of said company and Van Norden, assignee, to effect any drainage; and this respondent, again averring its utmost efforts, continued and persisted at all times, to make effective the drainage undertaken by the said company and its assignee, and to collect the assessments, shows, that the drainage, and the collections of the assessments therefor, failed, not from any act of omission or commission or conduct whatever of this defendant, but solely and only on account of the complete failure of the company and its assignee to accomplish the work of drainage and levees, which they undertook, and the other causes aforesaid, and the decisions of the courts hereinbefore mentioned, that there was no basis to demand their payment.

And further answering, this defendant shows, that all the allegations in the bill which charge respondent with any neglect of duty with regard to said work of drainage and its non-completion, and impute negligence or carelessness of any kind in respect to the collection of the said drainage taxes, and particularly the allegations that undertake to charge respondent with the responsibility for the non-collection of drainage taxes, are wholly untrue and unfounded, and hence this defendant denies all and every allegation in the bill to the effect that by the act of 1876 the duty was cast upon it "to complete the drainage system or some other," and that after said purchase, "respondent had the power, machinery and outfit to complete the system, or adopt some other that would have drained the lands or made them available for the payment of purchase warrants or any other," and that respondent had "an unlimited and unexhausted power of taxation," or any power of taxation, "by which defendant could have obtained the money to have completed the drainage," and that "defendant abandoned all pretense of draining," or destroyed or impaired in any manner what is styled by the bill the "source" from which all the warrants were to be paid, but each and all of said allegations, and all others to like effect, are entirely unfounded, and the facts are that respondent, after the adoption of the said act of 1876, did all in its power, and all that could be reasonably expected of it, to drain the lands; that it had no power, nor was it under any obligation, to adopt any system of drainage, or power of taxation for drainage purposes, the whole expense of which, under the law, was to be assessed exclusively on private property, that is, property owned by private persons, within the territory to be drained, and all taxation by this defendant being limited at all times by the constitution and laws of the State of Louisiana, and confined to municipal purposes other than and excluding all expense of drainage, and as to the assessments, at the time of the sale of the property and franchises, by Van Norden, while of the amount stated in the bill, they consisted, as herein already set forth, of the aforesaid illegal assessments on public streets, parks, squares, public places and other "public things," and of the aforesaid assessments against private property, or assessments against private persons, incapable of enforcement.

And this defendant denies the allegations to the effect that
194 the drainage from its commencement, or at any time, had been prosecuted with vigor by complainant or its assignee, and "that respondent ceased work on the same," and "sold some of the boats and machinery," save some old, unsound, dilapidated and useless boats and material, admitted to have been sold, and that respondent "allowed others to rot and sink," and that "they were in first-class condition when received," and that "respondent allowed the canals to fill up and become clogged," the fact being, and this respondent so avers, that the canals were clogged and filled up from the defects in the digging and of the construction by said company and its assignee; and defendant further denies, that they were in any sense destroyed or in the least manner impaired by it, but on the contrary, this defendant avers, that it sought and proceeded in every way to improve the said work of drainage, defective and insufficient from its inception, attempted by the company and its assignee, and this defendant specially denies that it destroyed or neglected "the plan of the company," and that it "incapacitated itself for drainage work," but all such allegations in the said bill, and others to like effect, denying defendant's diligence and other efforts to make serviceable the work of the company and its assignee, are wholly untrue; and further answering, defendant denies, that in the suit of The Park Commissioners *vs.* City of New Orleans, this defendant set up and claimed that it was entitled to an offset of drainage taxes against the demand urged in said suit, but that said taxes had been accounted for, and applied in the payment and redemption of drainage warrants, and were not "lost to the fund," as the bill charges; and this defendant denies that it ever claimed or appropriated a dollar of drainage taxes, and as to the allegation that when proceedings were brought against it to erase and cancel drainage taxes, that this defendant, with knowledge of the work and its value, never called witnesses to prove it, and that in the case of Girardey *vs.* The Heirs of Henry, that respondent, "with knowledge that the land was drained and of the benefit thereof," never called witnesses, etc., and "suffered the matter to go by default," this defendant shows that the matters in said allegations are untruly stated, and the facts are that there was no drainage or benefit to the lands involved in said proceedings and suit, and that the drainage taxes were by the court decreed to be cancelled, and the inscriptions erased, on the proof produced by the owners that there had been no drainage accomplished, and hence the taxes could not be collected, but not from any omission or negligence of this defendant; and defendant, further answering, shows, that if in some case, not particularized in the bill, steps were not taken to dissolve injunctions to restrain the execution of drainage judgments, it was, as this defendant believes and charges, because in view of the then pending litigation, contesting the said drainage taxes, in the opinion of the law officers and executive officials of this respondent of that period, executions and motions to dissolve only brought fresh litigation, barren of practical, beneficial or desirable result, in any particular; and this defendant, further answering, denies the allega

tions of the bill to the effect that since the aforesaid purchase,
195 it has "done nothing to compel the collection and payment of the drainage taxes, and nothing towards the collection of said taxes, but to keep an office in the city hall, where the agent of Warner Van Norden sought to induce payment of drainage taxes," etc., and that "but one execution had been issued on drainage judgments since June, 1876," and "that this defendant by other means had destroyed" or in the least "impaired the drainage fund," but defendant avers, on the contrary, that it used the utmost diligence to collect said taxes, and respondent denies to be true in any respect or particular, that it has become or is accountable for any drainage taxes collected, every dollar whereof ever collected having been fully accounted for and applied in accordance with law, or that any of said taxes have been misapplied, or that a dollar of said taxes has not been collected that could have been collected, or that a dollar has been wasted or lost, or misapplied, by the non-fulfillment of any duty by respondent, between June, 1871, and June, 1891, or between the date of the sale by said company to Van Norden, June, 1871, or at any other time or periods, but respondent avers, that its whole duty in the premises has been fully performed, particularly as hereinbefore alleged and again affirmed.

And further answering, respondent shows that in the year 1877, no drainage having been accomplished by the said company or its assignee, under assessments for the greater part made at least twenty years before, and in all that time clouding property against which they were assessed, and preventing its sale or improvement, the General Assembly enacted the statutes of that year, mentioned and referred to in the bill, by which certain lands were excluded from the drainage districts defined in earlier acts, and directing that no drainage taxes should be collected on any of the lands until there had been conferred and received by the same such improvement, by canals, levees and draining, as would effect drainage equal in value to the said assessments, and directing the erasure of drainage inscriptions, but respondent shows that for years after the adoption of the said statutes it used the utmost efforts to drain the said lands and collect the said assessments, and respondent admits that in May, 1881, in response to complaints of the property-owners against assessments for drainage never accomplished by said company or its assignee, the common council of defendant thought proper to instruct the mayor to issue his proclamation, advising the property-owners of their rights, as declared by the supreme court of the State of Louisiana shortly afterwards; and this defendant shows and admits that this decision of the highest court of the State of Louisiana was followed by the public notice and proclamation directed by the council, substantially to the effect of that decision, that the collection of drainage taxes could not be enforced; but respondent denies the allegation to the effect that after "this period of supineness and inactivity," referring to the collection of drainage taxes, the proclamation was directed, there having been, as this respondent avers, no such supineness or inactivity, at any time, on its

part; and respondent equally denies the allegation and in
196 the sense intended by the bill, "that said proclamation advised the non-payment of taxes," but avers that the proclamation announced the understanding by the council of the legal rights of the property-owners, as declared by the courts; and respondent also denies that the said council directed the other publication referred to in the bill, "in the prosecution of any purpose to destroy the drainage taxes and dissuade their payment, and to point out how the payment of drainage taxes might be avoided," save that the proclamation announced the relief to which the property-owners were entitled under the decision, and this defendant admits that large amounts of drainage taxes have been cancelled and erased under this decision, and that it has become the jurisprudence of the State, but this defendant denies that said taxes have been lost "in consequence of the suggestion or proclamation" put forth by defendant, but that said erasures and cancellations have been solely because, under the decisions of the courts, the collection of the drainage taxes could not be enforced.

Whether the acts of the General Assembly of the State of Louisiana of 1877 and 1882 on the subject are unconstitutional or illegal, or violative of article 1, section 10, of the Constitution of the United States, or are simply declaratory of legal rights as a legal proposition, this defendant submits to the court, and as to the allegation in the bill importing that this defendant used the act of 1877 as a pretence to cease or omit in any degree the efforts to drain said lands, and to collect the said drainage taxes, and "at other times pretended the lands were not worth the taxes," the same are untrue, but the facts are, that after, as before, the said acts, defendant's efforts to effect the said drainage and collect the taxes were persistent and continued, and though in fact a large portion of the lands seized for taxes were unsalable, as already stated, the fact was never suggested by defendant in any manner in connection with the collection of the said drainage taxes or work of drainage, and had not the least influence to diminish, nor did it diminish in any degree the efforts of this defendant to drain the said lands and collect the said taxes.

And further answering, this defendant shows that never liable for the so-called purchase warrants, payable only from drainage assessments, based on the prospective consideration of drainage, and the corresponding benefit, never fulfilled, and having used its best efforts to make effective the said drainage plan, and attempted execution thereof by the company and its assignee, not susceptible of being made serviceable for drainage, owing solely to the defective plan and entirely imperfect and insufficient work of the said company and its said assignee, and this defendant having used its utmost effort to collect said drainage assessment on private property, and not liable for the said assessments on public streets, parks, squares, public places and other "public things," not only because the drainage was never performed, but because the said assessments were utterly illegal and void, as hereinbefore set forth, this defendant shows that there is not the slightest basis to hold it

liable to complainant, or other holders of drainage warrants issued to Warner Van Norden, for the purchase of the said franchise, dredge-boats and other property, or for any cause whatsoever,
197 nor is there the least basis to hold that under the aforesaid act of 1876, or any other act, or for any cause whatever, the said purchase warrants have any claim to payment from or on account of said void assessments on public streets, parks, squares, public places and other "public things," nor is there any foundation whatever for the pretenses of the bill asserting the liability of this defendant for the warrants of 1871, or any other drainage warrants, payable only from drainage taxes that could be collected on assessments against private property, and on or in respect to which there is not and never was any liability whatever of this defendant, as hereinbefore alleged and again affirmed.

Further answering, this respondent shows that under the act No. 73 of 1872, this respondent issued $1,672,105.21 of the bonds of this city, since paid or funded into its bonded debt, to take up drainage warrants issued under act No. 30 of 1871, all of which bonds were used, and applied at various dates, between the 10th of May, 1872, and 31st of December, 1874, by exchanges for and redemption of said drainage warrants, to the full amount of $1,501,494.39 of said drainage warrants, the bonds having been issued in said exchanges at the rate of 90c. on the dollar, as directed by said act of 1872; and a statement of said bonds issued, and of warrants exchanged, with the ordinance of the council relating thereto, is herewith filed and made part hereof, and to which, as well as said acts, special reference is made, for fuller explanation and greater certainty, and now this respondent charges and avers that if said assessments on streets, squares and public places ever produced any liability on the part of respondent, again denied, then said bond issue and application thereof in the redemption of $1,501,494.39 of drainage warrants, far in excess of said assessments, must be deemed in law and equity to operate a full discharge of said liability, as adjudged by the Supreme Court of the United States, in the suit of Peake *vs.* The City of New Orleans, to which fuller reference is hereinafter made, and accordingly said discharge, if liability ever existed, this respondent in addition to all other defenses, now avers and sets up as a defense against and in bar of the complainant's bill, and of all the demands therein, and of all the relief thereby sought, and the full benefit of said discharge is insisted upon in this answer; and this respondent further shows that at and prior to the adoption of the act of 1876, and the purchase from Van Norden under it, the issue and application of the bonds aforesaid in the redemption of the drainage warrants, and the discharge thereby effected of all liability of respondent, if any ever existed, for the aforesaid illegal assessments of streets, squares and public places, was fully known to all drainage-warrant holders, and especially to Van Norden himself; that he or his assignees or pledgees were the holders of a very large amount of the drainage warrants redeemed by said bonds, and respondent believes and charges that the act of 1872 was passed mainly at the instance and for the benefit of said Van Norden, and neither he

nor any holder of drainage warrants can pretend or urge that the city of New Orleans is now to be called on to pay void assessments, when if the liability ever existed, again denied, it was more than satisfied by the aforesaid bond issue sought by Van Norden, and of which he and the other warrant-holders had the full benefit.

And further answering, respondent charges that fully apprised of said bond issue and said discharge the result thereof, neither the said Van Norden or any drainage-warrant holder can now urge that this respondent did not assert said discharge, known in its full scope and effect at all times to said Van Norden, and never controverted by him or any warrant-holder, until the utterly unfounded pretension was advanced in the previous suit of complainant, met promptly by the defense of said discharge, sustained by the decision of the Supreme Court of the United States; and respondent utterly denies that it ever acted upon or intimated that the said bonds were issued for any liability cast on respondent by the act of 1872, for there was no such liability; and respondent equally denies the allegation that the said legislative act of 1876 was in any line or word any recognition of the so-called "drainage fund" as it then stood on the records of the city or of the mortgage office, and "had not been discharged in any manner," etc., but respondent avers that the whole purpose and effect of said act was to require the application of collections of drainage assessments on private property to the payment of drainage warrants, and the act left the said discharge in full force and virtue; and as to the allegations in the bill to the effect that the discharge was not claimed, this respondent, reiterating the allegations in this answer on that point, avers and charges, that Van Norden, well knowing of said discharge, also knew that if he or any other warrant-holder ever undertook to set up the pretensions of this bill in respect to said void assessments, that respondent, with no reason to anticipate such unfounded demand, would repel it, and insist and maintain that said bond issue had completely discharged the asserted liability, or pretended obligation to apply the said assessments on streets, squares and public places, described in the bill as due by respondent, but never due, to the payment of said warrants issued to Van Norden, or to any other warrants; and respondent again denies, that said act of purchase, or any covenant therein, recognized in any manner the existence of any drainage taxes as applicable to the payment of any warrants, but the purpose and effect of said act was as this respondent has set forth, and not otherwise, and the stipulation in said act "not to impede, but to facilitate, the collection of drainage taxes," etc., to which the bill makes reference, refers to drainage assessments on private property, with which respondent has fully complied.

And further answering, respondent utterly denies the allegations that "Van Norden, who was ignorant respondent would claim said discharge, could have entered into said purchase if advised that such claim would be made," etc., and on the contrary, respondent avers that both he and the company, utterly insolvent, unable to continue the attempted drainage, the property professedly sold by

him to respondent having been subjected to sale under execution for the company's debts, and the sale to him adjudged
199 fraudulent, as appears by the decision of the supreme court of the State in the suit of Marchand *vs.* Van Norden, 23rd An., p. 803, that under such circumstances Van Norden was eager to sell to respondent for a price far in excess of the value of the property, and take his chance of payment from assessments on private property, and this respondent avers that the pretension now advanced of respondent's asserted liability for said void assessments is an afterthought, without merit or foundation of any kind.

Respondent further charges that all of the dredge-boats and other property sold to it by Van Norden were of little or no value, or in any event, of a value infinitesimal as compared with the price paid for the same, and that the sale thereof for the price stipulated as to such property was a fraud upon this defendant and its tax-payers.

And further answering, respondent shows that all the drainage taxes ever collected have been faithfully applied as the law directs, and the allegations in the bill that the taxes collected at the office in the city hall, or at any other place or time have not been accounted for, are denied; that if this defendant ever was a debtor for drainage taxes, which is denied, the aforesaid issue of bonds for the redemption of drainage warrants far exceeded any liability, if any there was, of this defendant, for collections, and at all times since said issue, on an adjustment of accounts, the said bond issue shows, and the fact is, that any and all liability for the taxes collected, if any ever existed, which is again denied, has been more than discharged by said bond issue more than sufficient besides to cover the aforesaid assessments on public streets, parks, squares, public places and other "public things," if said assessment ever produced any liability, which is again denied.

This defendant further shows, that in the suit of —— —— *vs.* —— ——, No. — of the docket of this court, this defendant was ordered and rendered an account of all drainage taxes, and defendant submits that there is no reason to renew the call or order for such account.

And respondent further charges that by the amendment to the constitution of the State of Louisiana, proposed by the General Assembly thereof in 1874, and which was subsequently adopted and went into effect from the first of January, 1875, the city of New Orleans was thereafter prohibited from increasing her debt in any manner, or from issuing any evidence of debt, or warrant for the payment of money, except against cash in the treasury, the said amendments providing that it should not prevent the issue of drainage warrants to the said Van Norden, transferree of the said company, under act 30 of 1871, but payable only from drainage taxes, to which amendment, found on page 56 of the Acts of the General Assembly of the State of Louisiana of 1874, special reference is made, and prayed to be taken as part hereof; and respondent shows, that drainage warrants, by the law of their creation, payable only from drainage taxes, never after that amendment could become part of

respondent's debt, nor could any omission of duty on the part of respondent, in respect to drainage or the collection of taxes, if any, which is again denied, or any act or conduct of respondent, or any act of the General Assembly, or purchase of property under such act, bind or obligate respondent, after such amendment, for the payment of any such drainage warrants, or for the purchase price of said property, or for any drainage warrants issued for such price, or for any debt or liability whatever in respect to drainage, nor did the said act of 1876, or contract of purchase, attempt to impose on this respondent any such prohibited liability, but in accordance with the said constitutional amendment, the price of the property directed by said act to be purchased could be paid only from assessments on private property, and, accordingly, the act and contract of purchase expressly stipulated that such price was payable from drainage taxes alone; and further answering, this defendant shows, that if, as respondent maintains, the aforesaid bond issue and application thereof must be deemed to operate as a complete discharge of all liability of this respondent, for the aforesaid assessments on public streets, parks, squares, public places and other "public things," if prior to said bond issue any such liability could be deemed to exist, which is again denied, then, in view of said amount, far in excess of the said assessments, furnished by this defendant, and applied by the drainage-warrant holders to pay their warrants, neither the act of 1876, nor the contract of purchase under it, could bind this defendant to pay one dollar of said assessments, or for the payment of any warrants, purchase or otherwise, from and out of said assessments, and thus create a debt in violation of said constitutional amendment, by reviving the asserted liability, which, if it ever existed, had been more than satisfied at and prior to the adoption of the said act of 1876; and respondent further shows that in the suit heretofore brought by said drainage-warrant holders, it had been adjudged by the United States circuit court that by reason of said constitutional amendment, as well as other defences, that save an accounting for taxes collected, said warrant-holders had no claim whatever against this respondent, and to said suits and decrees therein special reference is made, namely:

And further answering, this respondent shows that heretofore it was sought to be made liable to the holders of the drainage warrants, under the aforesaid legislative acts of 1871 and 1876, and that all the grounds then available to the warrant-holders, are, in respect to the defense of *res adjudicata*, by law deemed to be, and as a matter of fact are, included in that previous suit, and were the same as those on which respondent is sought to be held in this case, and the grounds of defense in that suit are in substance and effect the same as those urged in this present suit; that the relief sought in this suit is the same as that claimed in the previous suit, and the bill in that, as in this suit, was filed for and in behalf of all warrant-holders; that the question in this suit was certified when the case stood on the demurrer to the bill, to the Supreme Court of the United States, and the answer of the Supreme Court, it is submitted, should not affect or prejudice respondent in its defense in this

answer and on the testimony to be adduced, or to impair the defense of *res adjudicata* nor urged, and respondent shows, under the full testimony adduced, and the argument in the Supreme Court
201 of the United States in the previous case, there was rendered a final decree on the merits, affirming that of the circuit court, and adjudged against the complainant in that suit, and in favor of respondent, the court holding and deciding that the holders of drainage warrants had no right or claim against respondent in respect to the matters and things there alleged, and dismissed said bill, with no right to file another; all of which appears in the suit of said J. W. Peake *vs.* The City of New Orleans, No. 11614 of the docket of this court, and the final decree of the Supreme Court therein, found in 139 U. S. Reports, p. 342, to which special reference is made, and is prayed to be taken as part of this answer; and this defendant, entitled to include in this answer the defense based on said decision, now sets up and avers said *res adjudicata*, in bar of and against complainant's bill, and all demands therein, and of all relief thereby sought, and the full benefit of said defense of *res adjudicata* of which defendant could avail by the plea of said defense in bar of the bill is prayed for, claimed and insisted upon in this answer.

And further answering, this defendant shows, that the demands of the drainage-warrant holders, set up in the bill, have had full consideration in the courts, and have been fully pronounced without merit, and that the bill is an attempt to renew litigation upon some pretense of newly discovered grounds, substantially covered by past litigation and decrees, and in equity and law this litigation should be considered ended by the aforesaid peremptory exception of *res judicata*, as well as because of the prescription of five years, and respondent shows, that by the law of Louisiana, all suits and actions on promissory notes payable to order or bearer, and on all effects transferable of negotiable by indorsement or delivery and all promissory notes negotiable or otherwise, are prescribed by five years from maturity, and the prescription runs against all, as appears by the articles 3540 and 3541 of the Civil Code, to which special reference is made for fuller explanation and greater certainty; and respondent shows, that the drainage warrants, and this suit thereon, are within the scope of the said law of prescription, and said prescription of five years, in addition to all the other defenses herein urged and again affirmed and insisted upon, this defendant now avers and sets up as a defense, in bar of and against complainant's bill, and of all demands therein, and of all relief thereby sought, and the full benefit of said defense of prescription, could avail by the plea of said defense in bar of the bill, is prayed for, claimed and insisted upon by this answer.

And further answering, this respondent says, that any suit against it based upon any and all matters and things set out in the bill, cannot be maintained against it, for the reason that the same, and the liability sought to be established by the bill, is under the law of Louisiana barred by the prescription of ten years, established by articles 3544 and 3547 of the Revised Civil Code, to which special

reference is made, for greater certainty, the same as though set out at length herein, and in addition to all of the other defenses herein urged, and again affirmed and insisted upon, this defendant now avers and sets up as a defense, in bar of and against com-
202 plainant's bill, and any and all demands therein, of grounds upon which the same may be made, and of all relief sought, the said prescription of ten years; and this defendant claims all the benefit said defence of prescription could avail by the plea of the same in bar of the bill, the same said benefit being now prayed for, claimed and insisted by this answer.

And this defendant denies all and singular — and all manner of unlawful combination and confederacy, wherewith it is by the said bill charged, without this, that there is no other matter, charged, or thing in the said bill of complaint contained, material or necessary for this defendant to make answer unto, and not herein and hereby well and sufficiently answered, traversed, avoided, and denied, is true to the knowledge and belief of this defendant, all of which matters and things this defendant is ready and willing to aver, maintain and prove, *if* this honorable court shall direct, and humbly prays to be hence dismissed, with its reasonable costs and charges, in this behalf most wrongfully sustained.

(Signed) BRANCH K. MILLER,
SAM'L L. GILMORE,
City Att'y, Solicitors.

STATE OF LOUISIANA, }
Parish of Orleans. }

Personally appeared Walter C. Flower, who being duly sworn, deposes and says, that he is the mayor of The City of New Orleans, the defendant named above; that as much of the foregoing answer as concerns the acts or doings or omissions of the said defendant, is true to the best of his knowledge, and so much thereof as concerns the acts or doings of other persons he believes to be true.

(Signed) W. C. FLOWER, *Mayor.*

Sworn to and subscribed before me this 29th day of October, 1897.

[SEAL.] (Signed) P. ALPH. RABOUIN, *Not. Pub.*

Answer to Amended Bill.

Filed October 30, 1897.

United States Circuit Court.

JOHN G. WARNER
vs.
THE CITY OF NEW ORLEANS. } No. —.

Now comes The City of New Orleans, defendant herein, and reserving all manner of benefit or advantage to the many errors and insufficiencies in complainant's amended bill, for answer thereto, or unto so much thereof as respondent is advised is material to answer, it avers and says:

That whether or not the warrants on which complainant sues were or were not presented and indorsed as averred in said amended bill respondent has no knowledge, information or belief, but
203 whether presented or not, this respondent again avers that said warrants — never the obligations of this city, but dependent solely upon and restricted for satisfaction to drainage assessments on private property, streets, squares and public places, not being subject to any drainage assessments, or taxation in any form, and there being no drainage assessments on private property in respondent's hands or possession, all collections of such assessments having been fully accounted for and applied as required by the drainage acts, as set forth in respondent's original answer, all the allegations of which are again affirmed, the same as if included herein, this respondent is in no manner bound or liable in any manner on, for or in respect to said warrants, and least of all for any alleged interest thereon;

Wherefore respondent, reserving the full benefit of and reaffirming all the allegations in its original answer, prays that this answer to the amended bill be filed, and that judgment be rendered in respondent's favor, dismissing complainant's bill, with costs, and for all and general relief.

(Signed) BRANCH K. MILLER.

STATE OF LOUISIANA, }
Parish of Orleans. }

Personally appeared Walter C. Flower, mayor of the city of New Orleans, who being duly sworn, deposes and says, that all the allegations in the foregoing answer stated of his own knowledge are true and correct, and all the allegations stated on the information of others he believes to be true.

(Signed) W. C. FLOWER, *Mayor.*

Sworn to and subscribed before me this 29th day of October, A. D. 1897.

[SEAL.] (Signed) P. ALPH. RABOUIN, *Not. Pub.*

Replication.

Filed Nov. 2, 1897.

United States Circuit Court for the Eastern District of Louisiana.

JOHN G. WARNER
versus } In Equity. No. 12350.
CITY OF NEW ORLEANS.

The replication of John G. Warner, complainant, to the answers of The City of New Orleans, defendant.

This repliant reserving unto himself all and all manner of exception to the manifest insufficiencies of the said answers for replication thereunto says that he will aver and prove his said bill to be

true, certain and sufficient in the law to be answered unto, and that the said answers of the said defendant are untrue and insufficient to be replied unto by this repliant; without this that any matter
204 or thing whatsoever in the said answers contained, material or effectual to be replied unto, confessed and avoided, traversed or denied, is true.

All which matters and things this repliant is and will be ready to aver and prove as this honorable court shall direct, and humbly prays as in and by his said bill he hath already prayed.

(Signed) R. DE GRAY,
ROUSE & GRANT,
Solicitors for Complainant.

Stipulation as to Examiner.

Filed Dec. 2, 1897.

United States Circuit Court, Eastern District of Louisiana.

JOHN G. WARNER
vs.
THE CITY OF NEW ORLEANS. } No. 12350.

It is stipulated and agreed that the evidence of both parties to this suit may be taken before H. J. Carter, United States commissioner, as examiner, under equity rule 67; and that all evidence so taken may have like effect as if an examiner had been appointed by the court.

(Signed) SAM'L L. GILMORE, *City Att'y;*
B. K. MILLER,
Solicitors for Def't.
R. DE GRAY,
Solicitor for Complainant.

New Orleans, Dec. 2, 1897.

Motion and Order Fixing Cause for Trial.

Extract from the Minutes, November Term, 1897.

NEW ORLEANS, MONDAY, *December* 27, 1897.

Court met pursuant to adjournment.
Present: Hon. Charles Parlange, district judge.

JOHN G. WARNER
vs.
CITY OF NEW ORLEANS. } No. 12350.

On motion of Richard De Gray, solicitor for the complainant, it is ordered that this case be fixed for trial Wednesday, January 5, 1898, at 11 a. m.

205 *Order: Case Continued.*

Extract from the Minutes, November Term, 1897.

NEW ORLEANS, WEDNESDAY, *January* 5, 1898.

Court met pursuant to adjournment.
Present: Hon. Charles Parlange, district judge.

JOHN G. WARNER
vs.
CITY OF NEW ORLEANS. } No. 12350.

In this case, counsel for the defendant being absent from the city, Richard De Gray, solicitor for the complainant, moved that the case be reassigned.

Whereupon it was ordered by the court that the case be reassigned for Monday, January 17, 1898, at 11 a. m.

Hearing of Cause.

Notes of Evidence and Continuance.

Extract from the Minutes, November Term, 1897.

NEW ORLEANS, MONDAY, *January* 17, 1898.

Court met pursuant to adjournment.
Present: Hon. Charles Parlange, district judge.

JOHN G. WARNER
vs.
CITY OF NEW ORLEANS. } No. 12350.

This case came on to be heard at this term upon the bill, amended bill, answer, replication, exhibits, proofs and testimony.

Present: Richard De Gray and Rouse & Grant, solicitors for the complainant.

Branch K. Miller and S. L. Gilmore, city att'y, solicitors for the city of New Orleans.

Whereupon counsel for the complainant offered the following evidence on behalf of said complainant, namely:

1st. Complainants offer- in evidence the various statutes of the State of Louisiana relative to drainage in the parish of Orleans and parish of Jefferson, as contained in the printed acts of the State, to wit: No. 165 of 1858; No. 191 of 1859; No. 57 of 1861; No. 30 of 1871; sections 13, 14 and 15 of act 73 of 1872, together with its title; No. 16 of 1876; No. 48 of 1877; No. 67 of 1877; section 42 of act 20 of 1882; section 34 of act 7 of 1870; section 5 of act No. 71 of 1874; joint resolution No. 22 of 1874 and act No. 5 of 1870; act No. 133 of 1880; act No. 67 of 1884; section 6 of act 31 of 1876.

2nd. Complainants offer- in evidence the drainage warrants sued on in this case Nos. —, together with the presentation of said warrant at the bottom of each.

206 3rd. Complainants offer- in evidence ordinance of the common council of the city of New Orleans, No. 1359 A. S.

4th. Complainants offer- in evidence Exhibit A, filed with bill.

5th. Complainants offer- in evidence Exhibit B, filed with bill.

6th. Complainants offer- in evidence Exhibit C, filed with bill.

7th. Complainants offer- in evidence Exhibit D, filed with bill.

8th. Complainants offer- in evidence Exhibit E, filed with bill.

Said Exhibits A, B, C, D and E being the court proceedings and judgment declaring the mortgages on the land in the various drainage districts.

9th. Complainants offer- in evidence assessment 1, assessment in the 1st district.

10th. Complainants offer- in evidence assessment 2, assessment in the 2nd dist.

11th. Complainants offer- in evidence assessment 3, assessment in the 3rd district.

12th. Complainants offer- in evidence assessment 4, assessment in the 4th district.

13th. Complainant offers in evidence homologation No. 1.

14th. Complainant offers in evidence homologation No. 2.

15th. Complainant offers in evidence homologation No. 3.

16th. Complainant offers in evidence homologation No. 4.

17th. Complainant offers in evidence homologation No. 5, together with all the documents and papers annexed to said documents, the said homologation being the court proceedings and judgments, etc., homologating the drainage-tax rolls in the various drainage districts and filed with the bill herein.

18th. Complainant offers in evidence inventory 1. The appraisement of the property sold by Van Norden and the canal company to the city.

19th. Complainant offers in evidence transfer 1. Bill of sale from Warner Van Norden and the canal company to the city.

20th. Complainant offers in evidence ordinance No. 3479 A. S., appointing Thos. S. Hardee to examine, etc.

21st. Complainant offers in evidence ordinance No. 3539 A. S., providing for the issuance of the purchase-warrants.

22nd. Complainant offers in evidence ordinance No. 2460 A. S., being ordinance authorizing the receipt of drainage warrants for drainage taxes.

23rd. Complainant offers in evidence ordinance No. 4483 A. S., providing for the sale of dredge-boats.

24th. Complainant offers in evidence proposal for the purchase of dredge-boats, dated April 13th, 1878.

25th. Complainant offers in evidence ordinance No. 6741, dated December 15, 1880.

26th. Complainant offers in evidence Brosnan's reports on their dredge-boats, made pursuant to the above order.

27th. Complainant offers in evidence ordinance No. 6038, dated July 1st, 1879, A. S.

207 28th. Complainant offers in evidence ordinance No. 6396, dated March 17, 1880.

29th. Complainant offers in evidence copy of the deposition of the late Wm. H. Bell, given in the suit of Henrietta Davidson against The City of New Orleans, No. 1306, on file in the suit of Peake against The City of New Orleans.

30th. Complainant offers in evidence copy of the deposition of the late Joseph Collins, given January 17, 1881, in the suit of Henrietta Davidson against The City of New Orleans, the same being on file in the suit of Peake against The City of New Orleans.

31st. Complainant offers in evidence the report of Leche as administrator of improvements as to the conditions of the canals and the drainage machines.

32nd. Complainant offers in evidence the proceedings in the suit of 2447 superior district court, and copies of papers connected therewith from the comptroller's office of the city of New Orleans.

33rd. Complainant offers in evidence the pleadings in the following suits in this honorable court against the city of New Orleans, on file, and numbered as follows, to wit: John Crossly and Sons, Ltd., *vs.* The City of New Orleans, No. 9384. State of Louisiana *ex rel.* John Crossley and Sons, Ltd., *vs.* The City of New Orleans, No. 9935. John Crossley & Sons, Ltd., *vs.* City of New Orleans, No. 10337. James W. Peake *vs.* The City of New Orleans, No. 11614.

34th. Complainant offers in evidence ordinance No. 814 A. S.

35th. Complainant offers in evidence ordinance No. 820, locating the canals.

36th. Complainant offers in evidence extract from the books of the city surveyor, showing work done by the canal company and Van Norden, on file in the Peake suit.

37th. Complainant offers in evidence agreement, and act of pledge between Van Norden and the Mexican Gulf Ship Canal Company and sale of said dredge-boats by the canal Co.

38th. Complainant offers in evidence the assignment and transfer from Van Norden to complainant, filed with bill herein.

39th. Complainant offers in evidence opinion and decree of the supreme court of Louisiana in Davidson *vs.* City of New Orleans, 34th Ann. Rep., pages 170 to 178.

40th. Complainant offers in evidence the deposition of Van Norden taken herein before Mr. Harg, notary public of New York city, in June, 1895.

41st. Complainant offers in evidence the deposition of E. C. Palmer taken before W. L. Chipman, August 13, 1895.

42nd. Complainant offers in evidence in connection with the evidence of Palmer an act of pledge from Warner Van Norden to E. C. Palmer & Co. of the dredge-boats.

43rd. Complainant offers in evidence notice of J. O. Noyes, president of the canal company, to the city of New Orleans, dated March 14th, 1871, copy on file in the Peake case, to be found on page 338 of the printed Record.

44. Next, Surveyor W. H. Bell's report to the council, dated
208 March 23rd, 1871, copy on file in the Peake case and found in the printed Record at page 339 and following pages.

45. Next offers in evidence ordinance 814 A. S., adopted April 21st, 1871, copy on file in the Peake case, to be found in printed Record, pages 340 to 343.

46. Next offers in evidence extract from the proceedings of the city council July 18th, 1871, copy on file in the Peake case, to be found in printed Record, page 344.

47. Next offers in evidence ordinance No. 1252 A. S., adopted December 12th, 1871, copy on file in the Peake case and in the printed Record on page 345.

48. Next offers in evidence ordinance No. 1362 A. S., amending ordinance 820, adopted February 10th, 1872, copy on file in the Peake case, to be found in printed Record on pages 345 and 346.

49. Next offers in evidence ordinance No. 1374, adopted February 20th, 1872, copy on file in the Peake case, to be found in printed Record, page 346.

50. Next offers in evidence opposition of Mrs. Rey in the matter of the Commissioners of the First Drainage District, copy on file in the Peake case, to be found in printed Record, page 521.

51. Next offers in evidence opposition of Patrick Irwin in the same matter, copy on file in the Peake case, to be found in the printed Record, page 415.

52. Next offers in evidence opposition of Henrietta Davidson in the same matter, copy on file in the same case, to be found in printed Record, page 417.

In connection with the said oppositions:

53. We offer the opinion and decree of the supreme court of Louisiana, in the matter of the Commissioners of the First Drainage District as contained in the 27th Annual, pages 20 to 25.

54. Next offers in evidence copy of petition of appeal by the city of New Orleans in the matter of the Commissioners of the First Drainage District, filed October 3, 1863, in the third district court and the order of court allowing the same; the citation of appeal, and the sheriff's return on the same—copy on file in the Peake case, and to be found in the printed Record, pages 374 and 375.

55. Next offers in evidence copy of docket entries of the supreme court of Louisiana with the clerk's certificate attached in above case, showing no appeal was filed in the supreme court. Copy on file in the Peake case and found in the printed Record, pages 533 and 534.

56. Next offers in evidence copy of order of the third district court in No. 17028, in the matter of the Commissioners of the First Drainage District. Copy on file in the Peake case and found in printed Record, page 383.

57. Next offers in evidence ordinance No. 6970 A. S., providing for the issue of a proclamation by the mayor, adopted April 5, 1881, and the proclamation issued pursuant to said order, dated April 6, 1881, copies on file in the Peake case and found in printed Record, page 321.

209 58. Next offers in evidence complainant's map of drainage section in connection with the testimony of A. C. Bell, showing the work done.

59. Next offers in evidence complainant's map No. 2 of the lake-shore front, etc.

60. Next offers in evidence the deposition of S. D. Moody, on file in the Peake case and found on pages 39 and 40 of the printed Record.

61. Next offers in evidence deposition of Louis Laroque, taken in the Peake case on April 23rd, 1888, and found in the printed Record on pages 46 to 48.

62. Next offers in evidence deposition of Samuel Birchfield, taken in the same case and found in printed Record, pages 492 to 495.

63. Next offers in evidence deposition of E. H. Chadwick, on file in the Peake case and found in printed Record, pages 495 to 499.

64. Next offers in evidence the deposition of L. J. Fremaux, taken December 17, 1888, on file in the Peake case and found in the printed Record, pages 499 to 507.

65. Next offers in evidence the deposition of E. C. Palmer, taken in the Peake case on December 17, 1888, and found in the printed Record of that case from pages 507 to 518.

66. Next offers in evidence a report of the administrator of public improvements, dated November 16, 1874, to the city council of the city of New Orleans, together with ordinance No. 2846 A. S., adopted by the council of the city of New Orleans November 17, 1874.

67. Deposition of A. C. Bell, city surveyor, taken before Carter, examiner herein, on Dec., 1897.

68. Map of the drainage sections, showing canals and amount of work done.

69. Map or sketch of the proposed improvements on the lake-shore front.

70. Depositions of P. A. Rabouin, taken Dec. 24, 1897, in reference to copies of suit No. 2447, superior dist. court, found in his office as comptroller of city of New Orleans.

71. Deposition of Fred. C. Font.

72. Deposition of F. N. Butler.

73. Deposition of Richard De Gray.

74. Ordinance 1374, relating to Poydras canal.

75. Ordinance 3209, relating to Nashville canal.

And thereupon counsel for the defendant offered the following evidence on its behalf, to wit:

Defendant in open court, offers, introduces and files in evidence the following documents, papers, testimony and evidence:

First. Statements showing total collection in the four drainage districts, together with deductions against the same, including collections in cash, from July 1st, 1871, to July, 1876, amount collected in cash, and also in warrants; marked "D. A."

Second. Statements showing collections and disbursements from October, 1888, to date.

210 Third. Statement showing issuance of gold bonds to drainage-warrant holders from May 2, 1872, to December 31st, 1874.

Fourth. Ordinance No. 264 C. S., appointing committee of five to

investigate and report the condition of drainage taxes; also report of said committee; marked respectively "Defendant D" and "Defendant E."

Fifth. Ordinances 1504, 1507 and 1563 A. S., marked respectively "Defendant F 1," "Defendant F 2" and "Defendant F 3."

Sixth. Ordinance 1554 A. S., authorizing exchange of drainage warrants, one year after issuance, into city bonds, drainage series, issued under act 73 of 1872, marked "Defendant G."

Seventh. Statements of the civil sheriff of the parish of Orleans, of number and results of writs of *fi. fa.* issued on drainage judgments, marked respectively "Defendant H," and "Defendant I."

Eight. Judicial record and decision in the succession of Patrick Irwin, marked "Defendant J."

Ninth. Judicial record in case of J. W. Peake *vs.* City of New Orleans, No. 11614 of the docket of the circuit court for the eastern district of Louisiana, together with the petition of intervention of James Jackson filed therein; all pleadings, orders, judgments and decrees of the circuit court, the court of appeals, and the Supreme Court of the United States, down to the final decree of the circuit court; marked "Defendant K."

Tenth. Intervening bill of complaint of James Jackson in the said case; also petition, answer and judgment of the said Jackson in his suit against the city of New Orleans, No. 11558 of the circuit court of the United States, marked respectively "Defendant L 1" and "Defendant L 2."

Eleventh. Letter of T. J. Wolfe, Jr., Esq., secretary board of liquidation of the city debt, dated December 9th, 1887, stating disposition and present status of gold bonds issued under act 73 of 1872, marked "Defendant M."

Twelfth. Testimony of J. B. Guthrie, J. Ward Gurley, Jr., W. B. Willett, Robert Shortridge, John M. Newman, Louis Laroque, N. J. Hoey, W. I. Hodgson, Jos. Desposito and A. E. Auburtin, marked "Defendant N."

Thirteenth. Map referred to in the testimony of Henry C. Brown, marked "Defendant O."

Fourteenth. Testimony of Henry C. Brown, taken before the special examiner, December 8, 1897, marked "Defendant P 1."

Fifteenth. Testimony of B. M. Harrod and L. W. Brown taken before the special examiner December 9, 1897, marked respectively "Defendant P No. 2" and "Defendant P No. 3."

Sixteenth. Testimony of George Guinault, taken before the special examiner December 13, 1897, marked "Defendant P 4."

Seventeenth. Testimony of P. A. Rabouin, taken before the special examiner, December 24, 1897, marked "Defendant P 5."

Eighteenth. Testimony of Mrs. N. Pohlman, and Juste Fontaine, taken before the special examiner, December 29th, 1897, marked "Defendant P 6."

Nineteenth. Certificates of T. McC. Hyman, clerk of the
211 supreme court of the State of Louisiana, showing of what dates the decrees of that court became final in the succession

of Patrick Irwin, No. 1724 of its docket, and Mrs. Henrietta Davidson *vs.* City of New Orleans, No. 8260 of its docket, marked respectively "Defendant Q 1," and "Defendant Q 2."

Twentieth. Certified copy of act of sale of dredge-boats, etc., by the Mississippi & Mexican Gulf Ship Canal Company to Warner Van Norden, passed November 22, 1872, before A. Hero, notary public, marked "Defendant R."

Twenty-first. Entire record of suit of James W. Peake *vs.* City of New Orleans, No. 12008, of the docket of the circuit court for the eastern district of Louisiana, being the case in which the receiver of drainage taxes was appointed, and admission as to amount of assessments in the fourth drainage district, marked "Defendant S."

Twenty-second. Ordinances 1093 A. S., and 1301 C. S., marked respectively "Defendant T 1," and "Defendant T 2."

Whereupon the cause was argued in part by counsel for complainant and continued to Thursday, Jan. 20 at 9 a. m.

Agreement as to Objections and Testimony.

Extract from the Minutes, November Term, 1897.

NEW ORLEANS, MONDAY, *January* 17, 1898.

Court met pursuant to adjournment.
Present: Hon. Charles Parlange, district judge.

JOHN G. WARNER
vs.
THE CITY OF NEW ORLEANS. } No. 12350.

In this case in open court it is understood and agreed between counsel for the parties that all objections to evidence and testimony made by the parties before the examiner and noted in the record, shall be considered and heard by the court along with the argument and on the hearing of the cause, and shall be disposed of by the court when the cause is decided—this not to interfere with any papers heretofore offered without objection.

Hearing of Cause and Continuance.

Extract from the Minutes, November Term, 1897.

NEW ORLEANS, THURSDAY, *January* 20, 1898.

Court met pursuant to adjournment.
Present: Hon. Charles Parlange, district judge.

JOHN G. WARNER
vs.
THE CITY OF NEW ORLEANS. } No. 12350.

This case as continued from last Monday came on this day to be further heard upon the pleadings, exhibits, proofs and testi-

212 mony. After hearing additional arguments from solicitors for the complainant, it was ordered that the cause be resumed at 2 o'clock p. m. of this day.

Case Resumed, Hearing, and Continuance.

Extract from the Minutes of Thursday, January 20, '98.

JOHN G. WARNER
vs.
CITY OF NEW ORLEANS. } No. 12350.

This case as continued from this morning was resumed when owing to the pressure of other business before the court, to wit, an open case being argued in the district court, it was ordered that the further argument of this case be postponed until tomorrow at 10 o'clock a. m.

Hearing and Continuance.

Extract from the Minutes, November Term, 1897.

NEW ORLEANS, FRIDAY, *January* 21, 1898.

Court met pursuant to adjournment.
Present: Hon. Charles Parlange, district judge.

JOHN G. WARNER
vs.
THE CITY OF NEW ORLEANS. } No. 12350.

This case as continued from yesterday came on this day to be further heard, counsel for the parties being present.

After hearing arguments on behalf of the defendant, it was ordered that the case be continued until tomorrow at 11 a. m. for further hearing.

Hearing and Continuance.

Extract from the Minutes, November Term, 1897.

NEW ORLEANS, SATURDAY, *January* 22, 1898.

Court met pursuant to adjournment.
Present: Hon. Charles Parlange, district judge.

JOHN G. WARNER
vs.
CITY OF NEW ORLEANS. } No. 12350.

This cause as continued from yesterday came on this day to be further heard, counsel for the respective parties being present.

After hearing additional argument from counsel for defendant it was ordered that this cause be continued until Monday, January 24, 1898, at 11 a. m.

213 *Hearing and Submission.*

Extract from the Minutes, November Term, 1897.

NEW ORLEANS, MONDAY, *January 24th*, 1898.

Court met pursuant to adjournment.
Present: Hon. Charles Parlange, district judge.

JOHN G. WARNER
vs.
CITY OF NEW ORLEANS. } No. 12350.

This case as continued from last Saturday was this day resumed and counsel for the respective parties being all present, the cause was proceeded with.

After hearing additional arguments from counsel for the defendant and further arguments from solicitors for the complainant, the case was submitted—and taken under advisement by the court.

Agreement as to Transcript.

Filed March 11, 1898.

United States Circuit Court, Eastern District of Louisiana.

JOHN G. WARNER
vs.
CITY OF NEW ORLEANS. } No. 12350.

For the purposes of the appeal in this case, the following stipulation is made by the parties:

1st. That the drainage plans and maps offered in evidence by both parties and marked — respectively, may be brought up in the original and used in the court of appeals as part of the record.

2nd. The three drainage warrants sued on shall be omitted from the present transcript, a speciman copy being already included in the record of the former appeal already printed, which record it is agreed may be used in the circuit court of appeals for all purposes without again copying and printing the same, or other offering there already printed.

3rd. The detailed account of the city of New Orleans offered in evidence marked Defendant A, showing the funding of drainage warrants may be omitted from the transcript; but the summary of said account at the foot thereof, or at the beginning thereof, shall be copied in lieu of such account.

4th. The detailed account of amounts paid from drainage collections, as stated in the said account marked Defendant A, to Mayo, Guthrie, Van Norden and old drainage account, may be omitted, but a summary or recapitulation thereof is to be given.

5th. The bill and answer of the defendant in the case of James W.

Peake *vs.* The City of New Orleans, No. 11614, offered in evi-
214 dence by defendant, being already printed in the record of the former appeal in this case, shall be omitted from this transcript.

6th. In lieu of the whole record in the case of James W. Peake *vs.* City of New Orleans, No. 12008, U. S. circuit court, offered in evidence by defendant, there shall be copied in the transcript only the bill, answer and order appointing a receiver therein, and in place of the other parts of said record, it is stipulated that the city of New Orleans transferred and delivered to J. W. Gurley, receiver, certain real estate belonging to the drainage fund, and the drainage-assessment rolls, from which he realized $5,749.15, up to the date of his discharge upon rendering his final account on 30th day of March, 1894, that James F. Gasquet was appointed receiver to succeed him on the 30th day of March, 1894, and collected $1,134.85 from drainage assessments and was discharged on the 3rd day of June, 1895, and that on the 13th day of March, 1897, Juste Fontaine was appointed to succeed said Gasquet, and up to date has collected the amount stated by him in his deposition on file herein, and has not yet been discharged, and that appellant, Warner, was never a party to said suit No. 12008, and took no part therein, by intervention or otherwise.

7th. The certified copy of an act of sale of dredge-boats, etc., by Mississippi & Mexican Gulf Ship Canal Co. to Van Norden, passed November 22nd, 1872, before A. Hero, notary public, marked "Defendant R" shall be omitted from the present transcript, the same being already included in the transcript of the former appeal already printed.

8th. The detailed account of drainage work done by said canal Co. and Van Norden, taken from city surveyor's books (complainant's 36th offering), shall be omitted, but the recapitulation of said account of work done in drainage districts shall be copied in lieu thereof.

Provided, that either party may at any time bring up and supplement the transcript — any other portion or portions of the record.

(Signed) SAM'L L. GILMORE, *City Att'y.*
(Signed) B. K. MILLER,
Solicitor for Defendant.

Complainant's Evidence.

Act No. 165 of 1858; No. 191 of 1859; No. 57 of 1861; No. 30 of 1871; sections 13, 14, and 15 of act 73 of 1872, together with its title, No. 16 of 1876; No. 48 of 1877; No. 67 of 1877; section 42 of act 20 of 1882; section 34 of act 7 of 1870; section 5 of act No. 71 of 1874; joint resolution No. 22 of 1874, and act No. 5 of 1870; act No. 133 of 1880; act No. 67 of 1884; section 6 of act 31 of 1876; of the State of Louisiana relative to drainage in the parish of Orleans and parish of Jefferson, as contained in the printed acts of the State.

Drainage warrants sued on, Nos. ——, together with the presentation of said warrants at the bottom of each.

NOTE.—The three drainage warrants sued on shall be
215 omitted from the present transcript, a specimen copy being already included in the record of the former appeal already printed, which record it is agreed may be used in the circuit court of appeals for all purposes without again copying and printing the same, etc., as per agreement copied at page 53 of this transcript.

Ordinance of the common council of the city of New Orleans, No. 1359, A. S.

Included in the record of the former appeal already printed; not to be copied here, as per agreement at page 53 of this transcript.

Exhibit A, filed with bill; included in record of former appeal already printed; not to be copied here, as per agreement at page 53 of this transcript.

Exhibit B, filed with bill; included in record of former appeal already printed; not to be copied here, as per agreement at page 53 of this transcript.

Exhibit C, filed with bill; not be copied here, as above.

Exhibit D, filed with bill; not to be copied here, as per agreement stated above.

Exhibit E, filed; not to be copied here, as per agreement mentioned above.

NOTE.—Exhibits A, B, C, D and E, being the court proceedings and judgment declaring the mortgages on the land in the various drainage districts.

Assessment 1; assessment in the 1st district.

Assessment 2; assessment in the 2nd district.

Assessment 3; assessment in the 3rd district.

Assessment 4; assessment in the 4th district.

NOTE.—The above assessments offered are not to be copied here. Included in the record of the former appeal, already printed, as per agreement copied at page 53 of this transcript.

Homologation No. 1.

Homologation No. 2.

Homologation No. 3.

Homologation No. 4.

Homologation No. 5; together with all the documents and papers annexed to said documents, the said homologations being the court proceedings and judgments, etc., homologating the drainage-tax rolls in the various drainage districts, and filed with the bill herein.

NOTE.—The foregoing-described offer- of homologations, etc., are included in the record of the former appeal already printed, are not to be copied in this transcript here, as per agreement at page 53 of this transcript.

Inventory 1. The appraisement of the property sold by Van Norden and the canal company to the city; not to be copied here, as per reason given above.

Transfer 1. Bill of sale from Warner Van Norden and the canal company to the city; not to be copied here, being included in record of former appeal already printed. See agreement at page 53 of this transcript.

Ordinance No. 3479, A. S., appointing Thos. S. Hardee to
216 examine, etc.; not to be copied here, being included in record of former appeal, etc., as per agreement at p. 53 of this transcript.

Ordinance No. 3529, A. S., providing for the issuance of the purchase warrants.

Not to be copied here; included in record of former appeal, etc., as per agreement above.

MAYORALTY OF NEW ORLEANS,
CITY HALL, *December* 31, 1873.

No. 2460, administration series.

An Ordinance Authorizing the Receipt of Drainage Warrants in Payment of Drainage Taxes.

Be it ordained, That from and after the passage of this ordinance all drainage warrants heretofore or hereafter issued by the administrator of public accounts under act No. 30 of the legislature of 1871, with the accrued interest thereon, shall be receivable by the administrator of finance in payment of drainage taxes, and, in order to facilitate the payment of said taxes, the administrator of public accounts shall, on the application of any holder of a drainage warrant of a larger amount than the drainage tax which is to be paid, divide said warrant into suitable sums.

Adopted by the council of the city of New Orleans December 30, 1873.

Yeas—Brewster, Calhoun, Litzenreiter, Lewis, Schneider, Strucken, Turnbull.

LOUIS A. WILTZ, *Mayor.*

A true copy.
DANIEL SCULLY.

Ordinance No. 4483, *Proposals of City to Sell* 7 *Dredge-boats.*

MAYORALTY OF NEW ORLEANS,
CITY HALL, *April* 8, 1878.

(No. 4483, administration series.)

Be it ordained, That the administrator of improvements be, and he is hereby, instructed to advertise for sale the various dredge-boats and machinery purchased by the city from the Mexican Gulf Ship Canal Company, and that the bids for the purchase thereof be made by sealed proposals.

Adopted by the council of the city of New Orleans April 2, 1878.

E. PILSBURY, *Mayor.*

A true copy.
THOS. G. RAPIER, *Secretary.*

217 *Proposals for Purchase of Dredge-boats.*

DEPARTMENT OF IMPROVEMENTS,
CITY HALL, NEW ORLEANS, *April 11th*, 1878.

Sealed proposals will be received at this office until Saturday, May 11th next, at 12 o'clock m., for the purchase from the city of seven dredge-boats in whatever condition they now are, with all machinery and appurtenances thereunto belonging.

Parties bidding will be required to deposit with the administrator of finance 10 per cent. of the purchase price, as stipulated in the bid, a certificate of which must accompany the bid as a guarantee of good faith.

Terms cash on acceptance of bid. The city reserves the right to reject any and all bids.

JOHN McCAFFREY,
Administrator.

Ordinance No. 6741.

MAYORALTY OF NEW ORLEANS,
CITY HALL, *December* 15, 1880.

(No. 6741, administration series.)

Be it resolved, That each administrator be required to make accurate and detailed report of the condition of the department in his charge at the time of his induction into office, and that the said report be submitted to the city council at its regular meeting on Tuesday, December 28, 1880.

Adopted by the council of the city of New Orleans December 14, 1880.

Yeas—Delamore, Fagin, Fitzpatrick, Guillotte, Huger, Mealey, Walshe.

JOS. A. SHAKSPEARE, *Mayor.*

A true copy.
H. McNAMARA, *Secretary.*

Brosnan's Report on Dredge-boats.

OFFICE OF CITY SURVEYOR,
NEW ORLEANS, *Dec.* 26, 1880.

Hon. John Fitzpatrick, adm'r of improvements, city of New Orleans.

SIR: In compliance with ordinance No. 6741, A. S., I have the honor to submit the following report as to the condition of the dredge-boats belonging to this city:

Dredge-boat No. 1.

Now moored in Mississippi river, Algiers side, near Brady & McClellan's Dry Dock Co.; machinery on board; dipper and dipper handle lying on the bank.

218 Dredge-boat No. 4.

Sunk about twenty feet from dredge-boat No. 1.

Dredge-boat No. 3.

Sunk in People's Avenue canal; water foot and half above boiler deck; impossible to ascertain what machinery the boat contains; hoisting and working chains not in sight; dipper lying about three hundred feet above the boat on bank of the canal.

Dredge-boat No. 2.

Dismantled; hull sunk in People's Avenue canal.

Dredge-boat Clam Shell.

Dismantled and sunk in People's Avenue canal.

Ridge boat.

Dismantled and sunk in London Avenue canal.

Dredge Noyes.

Now lying in Upper Line canal with machinery aboard; boat in leaking condition; inventory of tools, etc., found on board now on file in this office; also receipt for dipper loaned Gen'l Slaughter.

Your attention is respectfully called to ordinance No. 6038, A. S., passed July 1, 1879, authorizing the dismantling of the boats "Clam Shell," Ridge, and No. 2, and ordering the machinery and old iron to be stored in Erato Street yard. Ordinance No. 6039, A. S., passed March 17, 1880, shows what disposition was made of the machinery, old iron, etc., of the dismantled boats.

Respectfully submitted.

(Signed) D. M. BROSNAN,
City Surveyor,
P'r L.

Ordinance No. 6038.

MAYORALTY OF NEW ORLEANS,
CITY HALL, *July 1st*, 1879.

(No. 6038, administration series.)

Whereas the dredge-boats No. 2, Clam Shell and Ridge, belonging to the city, are unfit for use, all their wood-work being in bad condition, not repairable, and necessitate much expense for guarding, watching, etc.: therefore

Resolved, That the administrator of improvements be, and he is hereby, authorized to have said boats broken up and the machinery and such portions of the material as might hereafter prove serviceable and valuable to the city properly housed and stored.

Be it further resolved, That when it shall become necessary or to

the interest of the city the administrator of improvements
219 shall from the above material cause the construction of one or more boats as may be required.

Adopted by the council of the city of New Orleans July 1st, 1879.

Yeas—Chevally, Glynn, Houston, Isaacson, Marks, Mealey.

J. W. PATTON, *Mayor.*

A true copy.

ROBERT C. WOOD, *Secretary.*

Ordinance No. 6396.

MAYORALTY OF NEW ORLEANS,
CITY HALL, *March* 17, 1890.

(No. 6396, administration series.)

Whereas, part of the wreck of three of the seven dredge-boats acquired by the city from the Mexican Gulf and Ship Island Canal Company, which being practically valueless except as old iron, is a care and burden to the city, as it necessitates storing and watching; and,

Whereas, the department of improvements needing large quantities of lumber, spikes and nails for the repair and construction of the street bridges, crossing and wings of this city: be it

Resolved, That the exchange of materials affected by the administrator of improvements with Messrs. M. Schwartz & Brother be, and the same is hereby, approved by the council.

Adopted by the council of the city of New Orleans, March 16, 1880.

Yeas—Chevalley, Collins, Glynn, Isaacson, Marks, Meallie.

J. W. PATTON, *Mayor.*

A true copy.

ROB'T C. WOOD, *Secretary.*

Certified Copy of Deposition of W. H. Bell.

Civil District Court.

HENRIETTE DAVIDSON ET AL.
vs.
CITY OF NEW ORLEANS. } No. 1306.

Testimony of Wm. H. Bell, taken by consent at his residence, January 29th, 1881.

Present: B. R. Forman, for plaintiff-; F. N. Butler, for defendant.

WILLIAM H. BELL sworn for defendant.

Examination-in-chief by Mr. BUTLER:

Q. What was your official position in the years 1871, 1872, 1873, and 1874?

A. I was city surveyor.

When did you become city surveyor?

220 A. I was elected in 1867.

Q. How long did you continue to be city surveyor?

A. Until December, 1874.

Q. Do you know anything about the drainage system that was inaugurated after the year 1871?

A. Yes; under the State act.

Q. That is act No. 30 of the year 1871?

A. Yes, sir.

Q. Who planned the work under that act?

A. I was city surveyor and drew the plan for the work, with the approval of the city council. It was submitted to the council and approved by them—the different lines and maps.

Q. Please look at this map and state what plan of drainage you drew for the work to be done under act No. 30 of 1871 (showing witness the map filed in evidence in this case).

A. There was to be an upper line protection levee, starting at the upper limits of Carrollton, running out along the line of embankment of the New Orleans, Jefferson & Lake Pontchartrain railroad to the lake shore; that was generally called the Upper Line protection levee. Then the plan contemplated a protection levee along the lake shore eastward to People's avenue; thence in People's avenue to Florida walk; thence along Florida walk to Fisherman's canal; thence along Fisherman's canal to the Mississippi river; that constituted the outside or main protection levees and reservoir canals. Then a new canal was excavated from Metairie road through Orleans avenue to the lake shore in the first drainage district. Another canal was excavated through London avenue from Gentilly ridge to the lake shore, and a number of old drainage canals in various parts of the city were widened and deepened, amounting in all to nearly twelve miles of canals cleaned out and enlarged.

Q. Was the Upper Line protection levee and canal completed from the Mississippi river to the lake shore?

A. It was completed to within four or five squares of the Mississippi river from the lake shore.

Q. What was the width and depth of that canal called the Upper Line canal?

A. Its average width is about forty-five or fifty feet and its depth ten to twelve feet.

Q. What was the length of that canal and levee?

A. Well, taking these figures on the map, there is an interval here not figured and another interval not figured, but these lengths you can get at the city surveyor's office.

Q. Was that lake-shore protection levee completed in whole or in part?

A. Two thousand two hundred feet was completed from the upper protection levee down to the new basin.

Q. Was the lower one or People's Avenue canal dug and a protection levee made there?

A. Yes, and a part of it graded. The Upper Line canal and pro-

tection levee was all leveled and graded; the Lower Line
221 canal along People's avenue was dug and a protection levee thrown up and partly graded. The eastern embankment on the Orleans canal, first section, was also graded.

Q. Do you know how many miles of canal and protection levees were actually dug and thrown up?

A. There were about twelve miles of new canals excavated and embankments thrown up and eleven to twelve miles of old canals widened and deepened. There were about twenty-four miles of canals that boats passed through. All these data you could get from the city surveyor's office.

Q. What would be the effect if that work was completed according to that plan?

A. It was to drain all the lands comprised within these levees and to do away with that swamp, and as a sanitary measure, if there never was a house built on those lands drained, as a sanitary measure the outlay would reimburse the city. My estimate was three millions of dollars, and as far as it went and as far as the work was accomplished, I was within the limit.

Q. That was the plan contemplated to accomplish?

A. The drainage of all these lands amounting to twenty-six thousand acres.

Q. What proportion of the work has been accomplished?

A. Fully two-thirds. There remains but the portion along Florida walk and up to Fisherman's canal, about 15,000 feet and 9,900 feet, and about three and a half miles of protection levee back of the first and third drainage sections on the lake shore.

Q. In case of a break in the Mississippi river—that is, in the levee above the city of New Orleans—is the work already done of any protection to this area of the city?

A. It was at the time when I had the levee built, but I understand the citizens have leveled down this levee and street. The levee was built and graded, but I understand that lately citizens have made those cuts in the levee, but at the time when it was built it would have protected this lower portion of the city from any crevasse above.

Q. This protection levee, then, as it was built, was a protection levee from overflow in case of a crevasse above the city for the first, second, and third drainage sections?

A. Yes; it was called and designated the Upper protection levee. It was built to protect the city from overflow from the lake, from the swamp water below, and from overflow above.

Q. These cuts made by citizens—could they be repaired?

A. Yes; it don't require much of a levee there. It don't take much time and expense to do that. The levee when built was a complete protection.

Q. Then I understand you to say that this Upper Line protection levee, the lake-shore levee, and the Lower Line levee would have the effect with the canals that have been built and were expected to be built—would have the effect to completely drain the whole area within these levees?

222 A. Yes; with the proper draining machines at the ends of the canals.

Q. Would it have the effect to drain the Allard place?

A. Yes; it would drain all with the limits.

Cross-examination by Mr. FORMAN:

Q. Is there not maintained at public expense a levee above the Upper protection levee along the Mississippi river?

A. Yes, sir.

Q. Is there not a levee on each side of the new canal?

A. On one side there is, where the railroad is. On the shell-road side the tide overflows the shell road. I have seen an ordinary tide putting water over the shell road, a change of the wind sometimes would put water over the shell road, but where the railroad runs that has been put high enough to be a protection levee.

Q. How far down does the levee run along the banks of the new canal on either side?

A. This runs along the Metairie ridge, where the double track of the city railroad is. That embankment was thrown up in widening the new canal, and when the city railroad company put their track on it, they put — high enough to be above storm water.

Q. What is the difference in level of this levee and the protection levee?

A. The protection levee, I think, is two feet higher. The embankment where this railroad runs was put as high as the Orleans levee. Mr. Brown spoke to me about the grade, and I told him to get the grade at the park of the Orleans levee, but these outside embankments were put two feet higher on account of being exposed to seas.

Q. This embankment along the New Basin canal was not done by the Mississippi and Mexican Gulf Canal Company?

A. No; the embankment was thrown up by the lessee of the canal and the grading was done by the city railroad company.

Q. There was no protection levee built from the New Basin canal to the Bayou St. John at all. Is there not a levee and embankment along the Bayou St. John?

A. No; not from the lake to the Marigny canal; there are no embankments.

Q. Are there not natural banks higher than the surrounding land?

A. In spots, yes; but in high water it overflows. Where the dredges have been excavating they have thrown up ridges, but you cannot call it a continuous levee.

Q. After act No. 30 of 1871 was passed was the plan of the board of commissioners of the first, second, and third drainage district changed or were they pursued? Do you know what the plans were under the act of 1858?

A. Well, the plan of the first drainage district was got up by Beauregard. His plan was not followed.

Q. Then the plan of the commissioners of the first drainage district was not followed by the city under act No. 30 of 1871?

A. If he had built such a protection levee as Beauregard
223 planned it would have been swept away. He had it to be made of planking and two or three feet out of water, and the seas would have swept it away. Any such embankment would have been a waste of money; therefore we did not adopt the board of commissioners' plan. Then his plan was a series of small canals and two sets of draining machines; but experience has shown that large machinery concentrated in one spot works better. Beauregard's plan was to have one machine here and another here, and three canals. The plan decided upon was to put large machinery at the lake.

Q. Has there been built by the city at the end of these canals any draining machines along the lake shore?

A. No; they put in one new wheel at the London Avenue canal, in the third drainage section.

Q. Were there any or are there any draining machines in the first draining section north of the Metairie ridge?

A. No, sir; that was not contemplated in the drainage act; that was for the city to do outside of that act.

Q. Has there ever been contemplated in the first drainage section canals and draining machines adequate to drain the lands north of the Metairie ridge?

A. About two-thirds of the canal system is completed.

Q. Answer my question first and then you may explain afterwards.

A. I believe I have answered.

Q. Has there been completed in the first draining section canals and draining machines adequate to drain the lands north of the Metairie ridge?

A. No; there has not been canals completed adequate to drain those lands north of the Metairie ridge, nor have draining machines been put up, but there has been two-thirds of the necessary canals completed.

Q. At the foot of Bayou St. John there was a certificate issued for work done for about four hundred and fifty dollars. What was that for?

A. A small canal was dug so as to form an island near the mouth of Bayou St. John to make a receiving canal and a road-bed on the inside of the Spanish Fort railroad track. I forget what street it was brought opposite, but it is shown in the surveyor's office, and the location of the bridge.

Filed Jan'y 31, '81.

(Signed) PHIL. POWER, JR., *D'y Cl'k.*

224 *Certified Copy of Evidence of Joseph Collins.*

From supreme court Louisiana, record No. 8260, Davidson *vs.* New Orleans, pp. 264 & 265.

3rd Dist. Court.

No. 1306.

Filed Feb'y 17, 1881.

JANUARY 17, 1881.

JOSEPH COLLINS sworn for plaintiff.

Examination-in-chief by Mr. FORMAN:

Q. Have you recently been administrator of improvements of the city?

A. I have up to the 15th November.

Q. State while you filled the office whether you sold any dredge-boats purchased from the Miss. & Mex. Gulf Canal Company.

A. Yes; I sold the wrecks of them—the machinery and iron-work. At least I exchanged them for iron and wood to make bridges. They were utterly useless.

Q. They were boats bought in 1876 from the Mississippi and Mex. Gulf Canal Co.?

A. Yes.

Q. During the time you were in office was the city doing anything towards carrying out the plans of commissioners of the 1st draining district?

A. No; nothing.

Q. These dredge-boats have not been used since 1876?

A. No; not to my knowledge. They were not used during my term of office. They were not fit to be used. There was nothing but the machinery left; the boats had sunk long ago.

Cross-examined by Mr. BUTLER:

Q. How long were you in office?

A. From the 1st of February to the 15th of November, 1880.

Q. Did you acquaint yourself with the plan of the drainage commissioners?

A. I had a pretty general idea.

Q. Did you understand the system?

A. Well, I think probably as well as any non-professional man could.

Q. Are you able to say if that system was carried to completion that the 1st drainage district would not be drained?

A. No, sir; I am not able to state that.

Q. If that plan or system were carried out are you able to state why then or not the lands in the 1st drainage district would be drained?

A. Well, I believe they would. That is my unprofessional opinion.

225 *Report of the Commissioner — Public Works of New Orleans, Dated September 5th, 1888.*

Report of the commissioner of public works.

The following is the report for the month as submitted by the department of public works:

To the honorable the mayor and common council of the city of New Orleans:

GENTLEMEN: When I had the honor to assume the charge of this department an inventory of the property delivered to me was taken and a receipt given to my predecessor. I am under many obligations to the Hon. Chas. J. Villere, acting commissioner at the time of the transfer, for his courtesy in acquainting me with the business of the department.

An inspection of the condition of the city showed that my predecessor, General Beauregard, had, with the limited means at his command, placed the second and third districts of the city in very fair condition, and had built and repaired great many bridges, including some large and costly canal bridges.

The first district was also in fair order, but the fourth, fifth, and sixth districts, owing to their large area, mud streets, and the small force at the command of the late commissioner, did not look as well as the other three districts, but showed signs of very much labor expended on them.

The drainage of the city is in a particularly deplorable condition. The area to be drained comprises about 14,450 acres, apportioned as follows:

To the Dublin Avenue machine (double wheel), 6,013 acres.

To the London Avenue machine (double wheel), 4,068 acres.

To the Melpomene Canal machine (single wheel), 2,160 acres.

To the Bienville Street machine (double wheel), 2,218 acres.

The London Avenue district is further assisted by the "Orleans pump." With the exception of the London Avenue station the wheels and engines are badly in need of repairs. The foundations are undermined and out of level and the cylinders all need reboring. The reboring of the cylinders would bring about an economy in fuel and an increase in power. The capacity of these machines was tested to the fullest extent by the unprecedented rainfall of over twenty inches between the 14th and the 28th of August. The condition of affairs was further complicated by extremely high water in the lake and canals leading from the lake into the city. The Bienville and Melpomene machines were worked until they were stopped by the extremely high water behind the wheels, which drove the water over the wheels into the city. The only machine in comparatively fair condition is that at London avenue, but it is badly handicapped by the condition of the protection levees in the district which it drains. Indeed, the protection levees in all of the rear portions of the city are as bad as bad can be.

226 The Butler levee was built originally in 1874, and was intended for the protection of the lower limits of the city from Ponchartrain railroad to Poland street. This levee is almost entirely gone, its destruction being caused principally by the tramping of cows. Large gaps have been cut in it on Claiborne street. There is an inflow of lake water of from twelve to twenty inches deep along nearly its entire length, thus furnishing 50 per cent. of the water which has to be drained out of the district by the London Avenue machine.

I reported this fact to the mayor and a quorum of the council present during the meetings of the council held for relief purposes, and I was informally authorized by the mayor and the council quorum to take proper steps to rebuild this levee, and to close the gaps. I commenced work upon this levee immediately, and am now closing the gaps by planking and bracing, and will raise the levee according to the specifications in the surveyor's office. I hope to have these gaps closed by the sixth of the month, and about the 7th will begin to raise the levee to such height as will shut out the lake water. This work will result in a large saving of coal at the London Avenue machine, reaching, in my mind, as high as 33 per cent., and will relieve the whole district between the Ponchartrain railroad and Poland street. In my opinion it will cost less to build and maintain the protection levees generally than to furnish rations to those unfortunates who are constantly inundated. The draining machines are — no service, no matter what their capacity and condition, if the lake waters are not kept from flowing into the city.

The coal supplied to the drainage machines is, in my opinion, of the most inferior quality. I have notified the contractors of this fact by letter of Aug. 10, and I have called the attention of the mayor to this condition of affairs. For the future I beg that your honorable body will give this subject your attention and appoint a committee of experts whose judgment will settle the matter and question of quality and relieve me of what I consider a great responsibility. The contractor insists that the coal which he furnishes is in accordance with his contract. There is between us on this subject an irreconcilable difference of opinion, and it seems to me that the council is the proper authority to settle this difference.

In order to relieve and assist the Bienville draining machine I have placed a "Menge pump" and 25-horse-power engine, hired from Mr. H. Dudley Coleman, on the New Basin levee, corner of Hagan avenue, and have found it to do extremely good work. I take the liberty of recommending that in place of the Bienville machine there be substituted a new wheel and engine built on the principle of the draining station on the Southside plantation, owned by Mr. F. W. Ames, in the parish of Jefferson, nearly opposite to this city. The workings of this machine can be witnessed by your honorable body at any time. It drains a larger area than the Bienville district with perfect satisfaction. I have in my possession the plans and specifications of this station, given me by Mr. J. W. Libby, one of the most competent, reliable and successful planters in the State of Louisiana. Three or four machines of this type in

th-rough working order and of sufficient size would keep this
227 city free from overflow by any such series of rains as we have experienced in August, however high the lake water may be in the canal.

This station was planned by Mr. Ames as the result of an extended tour made by him in Holland, which he visited for the purpose of investigating the system of drainage and drainage machines there prevalent, and, in my judgment, is of the very best type of a drainage station that can be adopted. Four of these machines can be built for $25,000 each. The old machines could remain in place until the council is thoroughly satisfied with the capacity of the new machines.

The drainage canals of the city are in a most unsatisfactory condition. From the machines to the lake they are filled with a natural growth of willows and of a variety of water grasses, to say nothing of the deposit of mud. This choking of the canals reduces their capacity to carry water fully 45 per cent., and it causes the water to back against the machines and reduces the capacity of the wheel, compelling a waste of power and consumption of coal.

The canals inside of the draining district which lead to the machines are full, some of them level with the banks and others within a foot of the banks. The material in these canals consists of slush and trash of all kinds which have flowed into them from the city gutters. If they were properly cleaned and dug out it would greatly improve the sanitary and drainage condition of the city. They would then empty the small ditches leading into them rapidly, and so act as a reservoir for the surplus rainfall, and would thereby prevent the overflows which occur in the rear of the city with every heavy rainfall.

The banks of the Carondelet canal are in a fearful condition and caused a great deal of trouble during the storm to this department. The water ran over them in sundry places from Claiborne street back to the Bayou St. John. The loss in property actually destroyed and the depreciation in the value of the real estate situated in that neighborhood, caused by the condition of the banks of this canal, are very large, and deserve the promptest action on the part of the city authorities.

My predecessors have always insisted that the obligation to maintain the levees upon the banks of this canal rests upon the canal company. The canal company claims that the obligation rests with the city. In order to settle this controversy I have addressed a letter to the mayor requesting him to direct the city attorney to proceed by mandamus under the provisions of act No. 133 of the acts of 1888, providing a summary remedy against corporations, to compel the corporation owning the canal to put its levees in proper condition and to maintain them.

The banks of the New canal are in a condition similar to those of the Carondelet canal. From Magnolia street to very near the Halfway house, a distance of over two miles, the levees are full of gaps, caused by the tramping of cattle and the rooting of hogs and the washing of rains. These levees for a long distance are below

the high-water line. During the late storm they gave me a great deal of trouble and required the closest attention of my entire
228 force almost to guard them. The banks of this canal are inhabited by squatting negro families, who use these levees for cultivation, thereby softening the soil, wearing them down, and placing them in a weak and dangerous condition. A crevasse to these people is a Godsend, because then they draw rations and live on the charity of the tax-paying citizens.

I cannot impress upon the council too strongly the great damage to levees, ditches, canals, streets and crossings produced by roaming cattle and hogs. It seems to me incredible that a few thousand of dollars — of cattle should be allowed to put in peril the many millions of property that depend for protection upon the integrity of these back levees. The sum annually expended by the city to repair these damages and to repair the damages to streets and gutters caused by the cattle and hogs is almost more than all of the roaming cattle and hogs are worth. In my opinion until your honorable body passes some stringent measure to suppress this intolerable nuisance the small appropriation for street cleaning and ditching and levee repairs will have been spent in vain.

The garbage-boats are in good order and kept according to contract, and are daily towed and emptied below the city limits. The new contractor, Mr. Forrester, is now in charge, working under his contract. A new garbage wharf is badly needed at the foot of Barracks street. The river has caved at that point and the wharf is old and dilapidated. It is in a dangerous condition and threatens to slide off at any time. Some repairs have been made to this wharf since I came into office, but it is too far gone for repairs and should be entirely reconstructed.

The wharves are in very fair condition with the exception of one or two points, which the lessees are now working upon, but in many cases the approaches to the wharves from Lafayette street to Louisiana avenue are in a horrible condition, and hauling through them is almost impossible. In view of the early opening of the cotton season their proper repair is suggested, but with the limited means at my command, and all parts of the city crying for attention, I can only bestow a certain amount of work on these points.

Since coming into office I held an inspection of all carts then in the employ of the city and found so many of them unfitted to perform proper service that more than one-half of them were rejected, and new carts taken their places which come up to the standard required. As all of the carts now in the city employ are efficient they are paid the sum of $2.50 a day, being the amount fixed by your honorable body. I consider the sum of $2.50 a day for a good cart to be economy as compared with $2 a day for a bad cart. We have now in the employ of the city 140 carts at an expense of $7,260 per month. This number of carts I consider absolutely necessary for the daily removal of garbage. Deducting this sum so paid for carts from my monthly allowance of $13,500 leaves only the sum of $6,240, which has to be apportioned between the payment of salaries, wages of laborers, conduct of the draining machines, construction of bridges and purchase of lumber and other material.

229 This, of course, is far short of the amount actually needed to enable me to perform even the things that are absolutely necessary, and I am compelled daily to ignore many just complaints that are made to the department of public works about the condition of streets, crossings, gutters, bridges, etc. Owing to reduced appropriation I have been compelled to cut my force of laborers down to a minimum of 104 men, and upon this small body of men falls the labor of caring for the 640 miles of streets in the inhabited portions of the city.

I desire to call the attention of the council to a great abuse practiced by many individuals in the commercial part of the city, to the great obstruction of drainage and street-cleaning, who cover over the gutters with structures of various kinds, which they use virtually as warehouses, and also to the many obstructions found in the gutters by bridges and crossings built by private individuals for their own convenience. As soon as I can get time to take this matter in hand I propose to institute a vigorous campaign against all of these people and compel them to remove all such obstructions and structures in such a way that the drainage of the streets will not be interfered with; and in this work I expect the sympathy and assistance of the council, as the abuse is one of long standing, and many persons will doubtless feel very much outraged to be compelled to conform to the law.

I desire further to suggest to the council that in future cypress should be used instead of pine for bridge-building. In my experience the life of a pine bridge is hardly more than a year, while the life of a cypress bridge is not less than five years; and, as the cost of pine is $12 per 1,000 feet and that of cypress $16 per 1,000 feet, there is a very large economy in using cypress instead of pine for bridges. I ask the council to investigate this matter, and if they agree with me in my opinion I request that in all specifications hereafter bridge timber of cypress be called for.

All of the railroads in the city, without exception or limitation, are in default in their obligations to the city to keep the streets through which they pass in repair. My numerous notices to them have either been disregarded or so partially and inefficiently complied with as to amount to nothing. As soon as I can have prepared an accurate survey of the amount of work to be done on the line of each railroad and the number of bridges to be reconstructed and repaired I propose to put them formally in default, and if they do not comply within a reasonable delay I shall ask the mayor to direct the city attorney against them under the provisions of the aforesaid act, No. 133 of 1888, which puts into the hands of this department a thoroughly efficacious remedy to compel these corporations to comply with their contracts to the public.

Excluding the work done on the draining machines, culverting, and necessary levee-raising and crevasse-closing brought about by the last storm, the following is a statement of the amount of the work done in this department during the month of August by my predecessor and myself, to wit:

Two thousand and seventy-six blocks of gutters cleaned, 389 blocks

of streets ditched, 467 blocks of streets graded, 754 blocks of
230 streets piled, 507 blocks of streets swept, 3,291 loads of pilings hauled, 5,789 loads of garbage hauled, 1,252 loads of ballast, brick and shells hauled, 452 loads of debris from storm hauled, 400 loads of lumber hauled, 5 new substantial canal bridges built, 3 canal bridges repaired, 5 bridges replaced, 123 new street bridges built, 157 street bridges repaired, 285 crossings, foot laps, etc., built and repaired.

In addition we have put Howard Street plank road from First to Erato street in good repair, using the old planking from the Melpomene Street canal. The new canal bridges above referred to were erected over the Camp Street culvert, and the material used in performing this work was 107,798 feet of lumber and 4,586 pounds of spikes.

The expenditures of this department during the month were as follows:

Tools, spikes, and implements	$422.54
Coal and lumber	4,076.35
Oils for bridges, etc	46.00
Pine wood for Orleans pump	429.01
Scrapers	200.00
Sundry bills	403.56
	$5,577.46
Officers' pay-roll	3,840.00
Street labor, carts, draining-machine pay-roll	12,588.87
Grand total	$22,006.33

Of this sum $6,535.01 was expended by my predecessor during the first seven days of the month and the balance by myself during the remaining twenty-four days.

E. T. LECHE,
Commissioner of Public Works.

Superior District Court for the Parish of Orleans.

COMMISSIONERS OF THE NEW ORLEANS PARK
vs.
THE CITY OF NEW ORLEANS. } No. 2447.

To the Hon. Jacob Hawkins, judge of the superior district court for the parish of Orleans:

The petition of the Commissioners of the New Orleans Park, a corporation established under the laws of Louisiana, and domiciled in the city of New Orleans,

Respectfully represents, that the city of New Orleans is justly and legally indebted unto your petitioner in the full sum of one hundred and seventy-one thousand two hundred thirty-seven and $\frac{80}{100}$ dollars ($171,237.80) exclusive of interest and costs, for this, to wit: that under section seven of the act of the General Assembly of the

231 State of Louisiana, entitled "An act to establish a public park for the city of New Orleans, and to provide means therefor," approved March 16th, 1870, it is made the duty of the city of New Orleans to impose and levy an annual tax on the assessed value of all the real, personal, and mixed property that is now or may hereafter be taxed by the city for any other purpose, of one-eighth of one per centum, which shall be collected by said city at the same time that it collects its taxes, and in the same manner; and the said tax of one-eighth of one per centum, as collected, shall be paid weekly by the treasurer of said city to the commissioners of said park. The said tax of one-eighth of one per centum shall be imposed and levied by the city of New Orleans immediately after the passage of this act for ten years thereafter; and it shall be imposed and levied on the assessment-rolls of said city for the year 1869, and shall be collected when the city collects its taxes for that year.

And no tax imposed and levied by said city for the year 1869, and for ten years thereafter, shall be legal, unless, in addition thereto the tax of one-eighth of one per centum provided by this act shall be imposed and levied.

Now your petitioner represents that under and by virtue of said section of said act of the State legislature, the said city of New Orleans levied and collected upon the assessment-rolls of 1869, in the year 1870, for account of your petitioner, the sum of one hundred and fifty thousand fifteen and $\frac{61}{100}$ dollars ($150,015.61); that said city of New Orleans also levied and collected in the year 1871, upon its assessment-rolls of 1870, and for said year, for account of your petitioner, the sum of one hundred fifty-seven thousand three hundred twenty-four $\frac{86}{100}$ dollars ($157,324.86); that said city of New Orleans also levied and collected, in the year 1872, upon its assessment-rolls of 1871, and for said year, for account of your petitioner, the sum of one hundred and twenty-two thousand seven hundred and two $\frac{93}{100}$ dollars ($122,702.93), making the aggregate sum total of special tax collected by said city of New Orleans, under said act of the State legislature, for account of, and belonging to your petitioner, of four hundred, thirty thousand, forty three and $\frac{40}{100}$ dollars ($430,043.40). That said amount thus levied and collected by said city of New Orleans for account of your petitioner, as aforesaid, your petitioner has been paid at various times, and received, in cash, certificates of appropriation issued by said city, and bonds of said city, the sum of two hundred and fifty-eight thousand, eight hundred, five and $\frac{60}{100}$ dollars ($258,805.60) thus leaving a balance due and unpaid, and coming to your petitioner, and in the bonds of said city of New Orleans, as aforesaid, of one hundred seventy-one thousand two hundred thirty-seven $\frac{80}{100}$ dollars ($171,237.80).

Your petitioner herewith files a detailed statement of said debts and credits, to which reference is made for further and full particulars.

Your petitioner further represents that notwithstanding it is made the duty of the treasurer of said city of New Orleans (*i. e.*, the administrator of finance) to pay over to your petitioner weekly, during

said entire term of ten years, said special tax, as collected, yet
232 payments on account of said collections have only been made to your petitioner'- treasurer (*i. e.*, by the administrator of finance) at irregular intervals, and in an irregular manner, and not in the proper currency actually collected by said city, and even deposited to the credit of your petitioner in the fiscal agency, but mostly in the bonds and certificates of said city, which are at a heavy discount for currency, and which your petitioner was compelled to receive as the only means of obtaining a settlement.

Your petitioner further represents that notwithstanding the premises, and the obligation of said city of New Orleans, and of Louis Schneider, administrator of finance, to pay over said large balance in hand belonging to your petition-, as aforesaid, and the repeated demands and solicitations of your petitioner, yet, that said city of New Orleans, and said Louis Schneider, administrator of finance, refuse so *as* to pay over said large balance aforesaid, first upon one unfounded pretext and then another.

Wherefore your petitioner respectfully prays that said city of New Orleans, and said Louis Schneider, the administrator of finance thereof, may be cited to appear and answer this petition; that after due proceedings had, judgment may be remanded in favor of your petitioner and against said defendant (The City of New Orleans) for the aforesaid sum of one hundred seventy-one thousand two hundred thirty-seven $\frac{80}{100}$ dollars ($171,237.80) with legal interest from judicial demand, and costs, and ordering the payment to your petitioner of all funds on hand which have been collected by said city heretofore for account of your petitioner, on account of said judgment; and further ordering said Louis Schneider, administrator of finance, etc., to make weekly payments to your petitioner hereafter, of all sums collected by him, or said city, for account of your petitioner, as required in said act of the legislature above recited; and your petitioner prays for general relief and as in duty bound, &c., &c.

(Signed) ALFRED PHILIPS,
WM. GRANT, *Attorneys.*

A true copy.
[SEAL.] (Signed) GEO. W. FLYNN,
Deputy Clerk.

(Indorsed:) No. 2447. Sup'r court. Copy of petition.

Sup'r District Court, Parish of Orleans.

COMMISSIONERS NEW ORLEANS PARK *vs.* CITY OF NEW ORLEANS ET AL. } No. 2447.

And now before the court comes the said defendants, and for answer to the petition herein filed and served, they deny each and every allegation therein contained except such as may be hereafter admitted; and upon the trial of this cause these respondents will require strict and legal proof thereof.

233 Further answering, they specially deny the correctness of the statement or account referred to in plaintiff's petition, and aver that many of the items set forth in such statement are erroneous and improper, and cannot be sustained by the court.

And recovering and now becoming plaintiff in reconvention these appearers show unto the court that they herewith file an exhibit of the true amount of park tax collected by the city of New Orleans, for account of plaintiff and of the nature and amount of the expenditures made by the said city and showing the condition of the accounts as they exist between the city of New Orleans and the park commissioners.

Furthermore these appearers say that the park commissioners as shown in and by the exhibits aforesaid, are indebted unto the city of New Orleans in the sum of ninety-three thousand seven hundred and thirty-six $\frac{57}{100}$ dollars, with interest according to law; and notwithstanding the said commissioners have been amicably requested to pay the amount due and owing as aforesaid, they have neglected and refused, and still do neglect and refuse so to do.

Wherefore these appearers pray that the account of the park commissioners referred to in their petition and filed herein may be dismissed, and that upon the original demand judgment may be rendered in favor of appearers and against said commissioners.

They further pray that the New Orleans park commissioners may be cited to appear and answer this demand in reconvention; that in due course of law the exhibit herewith filed by these appearers may be homologated, approved and made the judgment of this court; that in conformity thereto the city of New Orleans may have and recover judgment against the park commissioners in the sum of ninety-three thousand seven hundred thirty-six $\frac{57}{100}$ dollars, with interest in accordance with law; that the said commissioners may be condemned to pay all the costs of this suit, and that reconveners may have general relief in the premises.

(Signed) GEO. S. LACEY,
City Attorney.

A true copy.
Attest:
(Signed) JOSHUA CORPREW,
D'y Cl'k.
[SEAL.]

(Indorsed:) No. 2447. Copy answer.

CLERK'S OFFICE, SUPERIOR DISTRICT COURT,
NEW ORLEANS, *June 27th*, 1873.

In the matter of Commissioners of New Orleans Park *vs.* City of New Orleans, numbered 2447 of the docket of the superior dist. court, I do hereby certify that judgment was rendered on the 7th day of June, 1873, and signed June 12th, 1873, and consequently is now final and executory.

(Signed) JOSHUA CORPREW,
D'y Cl'k.
[SEAL.]

234 THE STATE OF LOUISIANA:

Superior District Court for the Parish of Orleans.

COMMISSIONERS OF N. O. PARK
vs.
CITY — NEW ORLEANS. } No. 2447.

$96.60.

I hereby certify that the clerk's costs in this case amount to ninety-six $\frac{60}{100}$ dollars.

Clerk's office, this 25th day of June, 1873.

(Signed) J. CORPREW, *D'y Clerk.*
ALFRED PHILIPS, *Attorney.*

(Printed in left-hand margin:) New Orleans, ——. Received payment. Alf. Phillips, attorney.

Superior District Court for the Parish of Orleans.

COMMISSIONERS N. O. PARK
vs.
CITY OF NEW ORLEANS. } No. 2447.

I hereby certify that the sheriff's fees in this case amount to twenty $\frac{50}{100}$ dollars.

(Signed) M. McNAMARA,
Deputy Sheriff.

New Orleans, June 26, 1873.
HARPER.

(Printed in margin on left:) Received payment. N. O., ——.

(*Itemized Statement on Reverse.*)

Defaced here, cannot be written.

11 cit. pet. 2 c.	$4.00
16 cit. ans. & R. D.	2.00
May 12–15 7 subp.	3.50
May 15 cab hire	3.00
May 14–15 4 subp.	2.00
May 15 3 attach'ts.	3.00
May 19–20 2 subp.	1.00
May 23–24 2 subp.	1.00
June 3–4 2 subp.	1.00
	$20.50

235 THE STATE OF LOUISIANA:

Superior District Court for the Parish of Orleans.

I hereby certify that on the 7th day of June, 1873, judgment was rendered in this court in the following-entitled suit in the words and figures following, to wit:

COMMISSIONERS OF THE NEW ORLEANS PARK
vs.
THE CITY OF NEW ORLEANS. } No. 2447.

This case continued to this day, came on.

Present: Alfred Philips for plaintiff; A. C. Lewis, ass't city attorney, for defendant.

After hearing pleadings, evidence, and counsel, the matter was ordered to be submitted to the court for determination. After deliberations and for the reasons orally assigned this day in open court, the court considering the law and the evidence to be in favor of plaintiff—

Ordered, adjudged, and decreed that there be judgment in favor of plaintiff, The Commiss. of the New Orleans Park, and against The City of New Orleans, the defendant, in the sum of seventy-eight thousand one hundred and seventy-eight $\frac{12}{100}$ dollars ($78,178.12), with five per cent. interest from judicial demand until paid; and that defendant pay costs.

Judgment signed June 12th, 1873.

(Signed) JACOB HAWKINS, *Judge.*

In testimony whereof I have hereunto set my hand and affixed the seal of the said court, at the city of New Orleans, on this 25th day of June, in the year of our Lord one thousand eight hundred and seventy-three, and the ninety (*yth*) year of the Independence of the United States.

[SEAL.] (Signed) JOHN BURKE, *Clerk.*

NOTE.—Judicial demand was made on the 11th March, 1873.

(Indorsed:) No. 2447. Superior district court for the parish of Orleans. Commissioners of the N. Orleans Park *vs.* The City of New Orleans. —— ——, attorney. Copy of judgment to be served on —— ——. Received June 28th, 1873. L. F. Barrett and —— ——. Registered in Book 2, folio 47, July 1, 1873. (In red ink at top of indorsement:) 221. (In red ink across face of indorsement:) Judg't satisfied M'ch 31, '83. See suit No. 7941, civil dist. court.

236 DR. *Commissioners of New Orleans Park in Account with the City of New Orleans.* CR.

		Taken from the acc'ts of the city of N. O.	Taken from the acc'ts of the commissioners.			Taken from the acc'ts of the city of N. O.	Taken from the acc'ts of the commissioners.
1871.							
May 6.	To cash paid them by check on Bank of New Orleans	$16,446.06		Dec. 31.	Collected park tax—		
15.	" cash paid the commissioners $5,000				Of 1869	$148,931.28	$150,015.61
22.	" cash paid the commissioners 5,000				Of 1870	35,016.10	157,324.86
		10.000			Of 1871	122,702.93	122,702.93
	18/to 23/71.					$306,650.31	
	Tax deposited in the Lou. Sa. Bank & Safe Deposit Co.:				Balance forward	93,736.57	
	Of 1869 $11,010.49						
	Of 1870 12,867.45						
		23,877.94					
	Feb'y/72 to May/72.						
	Tax deposited in the Louis'a Sa. Bk. & Safe Deposit Co. of 1871	19,194.28					
		69,518.78	69,518.80				

DR. (Continued.) CR.

1872.							
Jan. 3.	Paid them in certificates of appropriation No. 2, 1872, ord. 1274	$25,000					
4.	" them in new 7.30 certif., 209/216, ord. 1274	36,029.67					
		61,029.67	45,139.88				

Feb. 12.	Delivered them ten per cent. bonds in pledge, letter P, 45 of $1,00 each, No. 956/1000 ord. No. 1335		45,000	34,446.92		
Ap'l 25.	Paid them in funding certificates 1/7, 7 of $20,000 ea., 140,000, ord. No. 1472, at 90c		12,600	109,700	49,700 60,000	
	Amount of drainage tax reserved		36,397.85			
	Amount of unpaid city tax in suit, viz:					
	For 1870, 4th dist. ct	30,504				
	Vide 539, sup. ct	13,000				
	1871, 4th dist. ct	36,805				
	Vide 539, sup. ct	17,875				
			30,875			
	Amount refunded on account of tax excess on park tax, 1890	25,523.41				
	Do. in process of refunding	6,042.17				
			31,565.58			
			400,386.88	258,805.60		$400,386.88
Dec. 31.	Balance due to the city of N. O.		93,736.57	171,237.80		
				$430,043.40	Amount claimed by them as balance to their credit as per 1st acc't rendered, amo	430,043.40

Dr. (Continued.) Cr.

(Indorsement:) 2447. A. A. Filed May 15, 1873. Geo. W. Flynn, d'y clerk. U. S. circuit court, eastern district of Louisiana. Filed Jan'y 17, 1898.

238 DR. *Park Commissioners in Ac. with the City of New Orleans.* CR.

1871.					
May 6.	Cash paid commissioners		16,446.06	By park tax collected—	
15.	Cash paid commissioners	5,000		For year 1869	$148,931.28
22.	Cash paid commissioners	5,000		For year 1870	145,318.26
			10,000	For year 1871	122,702.93
18 & 23.	Cash deposited		23,877.94		$416,952.47
1872.					
Jan. 3.	Am't paid in certificates	25,000			
4.	Am't paid in certificates	36,029.67			
			61,029.67		
Feb. 12.	Am't paid for 10% bonds		45,000.00		
Ap'l 25.	Paid in funding certificates		126,000.00		
	Drainage tax		26,725.90		
	City tax for 1870 on $525,000.00		10,500.00		
	To balance		78,178.12		
			$416,952.47	June 12/73. By balance	78,178.12

27
34
42
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$416,952.47 4

Judgment June 12/73, for $78,178.12.

* * * * * * * * *

Statement upon which the judgment for $78,178.12 is based.
12350

* * * *

Filed Jan'y 17, 1898.

239 Superior District Court, Parish of Orleans.

LACEY & BUTLER
vs.
THE COMMISSIONERS OF THE NEW ORLEANS PARK. } No. 2429.

To the honorable the judge of the superior district court for the parish of Orleans:

The supplemental petition of Lacey & Butler respectfully represents—

That they have obtained from the clerk of this honorable court a writ of *fieri facias*, ordering the sheriff of this parish to seize and take into his possession the property, real and personal, rights and credits, of defendant- The Commissioners of the New Orleans Park, and to cause to be made, in the manner prescribed by law, an amount sufficient to pay and satisfy the said writ, viz., eight thousand dollars, interest and costs; and having good reason to believe that the City of New Orleans is indebted unto said defendants, or has property or effects in her possession or under her control belonging to said defendant-:

Therefore petitioners pray that said City of New Orleans be made garnishee herein and ordered to answer under oath the accompanying interrogatories, and, after all due and legal proceedings, condemned to pay the amount of said writ and costs.

(Signed) LACEY & BUTLER,
In Propria Persona.

Interrogatories.

To be answered categorically under oath, in writing, and within — days from service.

1st. Had you in your hands, or under your control, directly or indirectly, at the time of service of these interrogatories or at any time since, any money, rights, credits, or other property whatsoever belonging or due to the said defendant- in execution or in which they have or had any interest for the whole or for a part, and if yea, what is the nature, description, and amount thereof; and is the same sufficient to pay or satisfy the full amount of said judgment, or if less, to what amount—you being asked and required to make a full disclosure in relation to the same.

2nd interrogatory. Were you not at the time of service upon you of these interrogatories, or since, directly or indirectly, indebted or obligated unto said defendants in execution for anything or for any sum whatever, whether for yourself alone or together wtih others, in consequence of any sale, or exchange, or transaction of any kind whatever, whether the same be due or to become due, and whether the interests of said defendant- in execution be direct or indirect, or be for the whole or a part only, or whether it be by bill, note or otherwise, and if yea, what is the nature, description, and amount thereof, and is the same sufficient to pay or satisfy the full

240 amount of same and costs, or if less, what amount? You being asked and required to make a full and detailed disclosure in relation to the same.

3rd interrogatory. Have you at any time since the service of notice of seizure in your hands herein made, directly or indirectly, unto or with the said defendants in execution any payment or novation, or compromise, or arrangement, or given them any note or other written obligation, or received from them directly or indirectly, any receipts or acquittance?—and if yea, state the nature, description, and amount thereof, and the time, place, and circumstances of the same.

4th interrogatory. State particularly whether or not there are funds in the hands or under the control of the city of New Orleans arising or to arise from what is known as the park tax? What amount of such fund has been collected and yet remains to be collected and yet remains in the possession or subject to the control of the city of New Orleans, directly or indirectly.

Order.

Let this supplemental petition be filed; and let the city of New Orleans be made garnishee herein, and let Louis A. Wiltz, mayor of said city, be ordered to answer the accompanying interrogatories under oath, in writing, within ten days from service, and as the law directs as herein prayed for.

New Orleans, May 1st, 1873.

(Signed) JACOB HAWKINS, *Judge.*

A true copy.

J. CORPREW, *D'y Clerk.*

Superior District Court.

LACEY & BUTLER
vs.
THE PARK COMMISSIONERS OF THE NEW ORLEANS PARK. } No. 2429.

And now before the court comes the city of New Orleans, by L. A. Wiltz, mayor, and for answer to the interrogatories herein says:

To 1st interrogatory: No.

To 2nd interrogatory: No.

To 3rd interrogatory: No.

To 4th interrogatory: There are funds in the hands and under the control of the city of New Orleans arising or to arise from what is known as the park tax, to wit:

The assessment of the park tax are as follows, to wit:

For 1869, collectible 1870, as far as can be ascertained.	$159,928.46
Actually collected up to Ap'l 30, '73.....	149,065.81
Balance to be collected.....	10,863.15
	$10,863.15
For 1870, collectible 1871, as per register.....	174,784.08
Collected up to June 1, '71.....	$31,565.58

241 When the supreme court stopped the collector, whereupon the city council furnished so-called "tax excess certificates" for the above amount already collected, whereby the same will be referred.

Amount paid in since, through sheriff, and otherwise, up to April 30, '73, amounting to	$3,933.20	
For 1871, collectible 1872, as per register.	173,032.76	
Actually collected up to Ap'l 30, '73....	131,608.19	
	$41,424.57	$41,424.57
For 1873, collectible 1873, as per register.	169,864.12	
Actually collected up to Ap'l 30, '73....	28,185.95	
	$141,678.17	141,678.17
Total amount to be collected.....		$193,965.89

Having paid into the hands of the N. O. park commissioners and placed at their disposal in bank a total amount of $301,548.75, and taking into consideration that the park property still owes a drainage tax of $36,397.85 and a city tax of 1870 and 1871 $30,875, making an additional amount of $67,272.85, or a total balance debt of $368,821.30, while the collections only amounted (as per above specification) to $312,792.65.

The said commissioners of the park are in debt to the city of New Orleans this day to the amou-t of $56,028.65.

The park commissioners have sued the city of New Orleans in the superior district court of the parish of Orleans, and in that suit all the matters set forth in the above answer and statement of the city are being judicially enquired into. The final judgment to be rendered in that case will determine whether or not the city is indebted to the park commissioners, and the amount of such indebtedness, and until such judgment the city declares that she is not so indebted, but on the contrary, that the park commissioners are indebted to the city in the sum of $56,028.65.

(Signed) LOUIS A. WILTZ, *Mayor.*

Sworn to and subscribed before me this 10th day of May, A. D. 1873.

(Signed) W. L. EVANS,
Second Justice Peace for the Parish of Orleans.

Superior District Court, Parish of Orleans.

LACEY & BUTLER
vs.
THE COMMISSIONERS OF THE NEW ORLEANS PARK. } No. 2429.

On motion of Lacey & Butler and upon suggesting to the court at the city of New Orleans to the interrogatories in garnishment rein propounded have made answer as follows:

242

The park commissioners have sued the city of New Orleans in the superior district court of the parish of Orleans, and in that suit all the matters set forth in the above answer and statement of the city are being judicially enquired into. The final judgment to be rendered in that case will determine whether or not the city is indebted to the park commissioners and the amount of such indebtedness.

And upon further suggesting that a final judgment has been rendered in the suit of "Commissioners of the New Orleans Park *vs.* The City of New Orleans *et al.*, No. 2447, of the docket of this honorable court," said judgment having been rendered on the 7th day of June, A. D. 1873, and (*the*) signed on the 12th day of June, A. D. 1873, the same is now final, no appeal having been taken from said judgment.

And upon further suggesting that in and by the judgment rendered as aforesaid, the city of New Orleans has been adjudged and decreed to be indebted to the commissioners of the New Orleans park in the sum of seventy-eight thousand one hundred and seventy-eight $\frac{12}{100}$ dollars, with five per cent. interest, from March 10th, 1873.

It is ordered that the city of New Orleans show cause on Friday, the 27th day of June, A. D. 1873, at eleven o'clock a. m., why judgment should not be rendered in favor of appearers and against said city as garnishee, for the sum of eight thousand dollars, with legal interest thereon, from the 1st day of March, A. D. 1873, until paid, and costs, said amount when paid to operate as a credit upon the judgment rendered in favor of The Commissioners of the New Orleans Park *vs.* The City of New Orleans, *et als.*, No. 2447, superior district court, for the aforesaid sum of $78,178.12 *dollars* and interest.

Superior District Court for the Parish of Orleans.

LACEY & BUTLER
vs.
COM. N. O. PARK.

And now before the court comes the defendant in garnishment and for answer to the rule why judgment should not be rendered against her in favor of Lacey & Butler, she denies all and singular the facts and allegations in said rule contained.

Wherefore she prays that the same may be discharged with costs and for general relief.

(Signed) A. C. LEWIS, *Att'y.*

Judgment on Rule.

Rendered June 27th, 1873.

The rule taken herein by plaintiff against the city of New Orleans, garnishee, assigned for today, came on.

Present, F. N. Butler, for plaintiff; A. C. Lewis, ass't city att'y, for def't.

243 After hearing pleadings, evidence and counsel, the court considering the law and the evidence to be in favor of plaintiff, ordered, adjudged and decreed that there be judgment making said rule absolute and condemning the defendant in rule, The City of New Orleans, garnishee, to pay to plaintiffs Lacey & Butler the sum of eight thousand dollars, with legal interest thereon, from 1st day of March, 1873, until paid and all costs, said amount to operate, when paid, as a credit upon the judgment rendered in favor of the commissioners of the New Orleans park against the city of New Orleans, No. 2447 of the docket of this court, for the sum of $78,178.12 *dollars* and interest.

Judgment signed July 2, 1873.

(Signed) JACOB HAWKINS, *Judge.*

Clerk's Certificate.

I, Joshua Corprew, deputy clerk of the superior district court for the parish of Orleans, do hereby certify that the foregoing fourteen pages do contain a true, complete and correct copy of the supplemental petition, interrogatories, answers to interrogatories, rule against city of New Orleans (garnishee), answer to rule and judgment on rule, which judgment is now final, and executory in the cause entitled "Lacey & Butler *vs.* The Commissioners of the New Orleans Park," numbered 2429 of the docket of the superior dist. court for the parish of Orleans.

In testimony whereof I hereunto set my hand and affix the impress of the seal of the said court, at the city of New Orleans, on this 3rd day of July, in the year of our Lord one thousand eight hundred and seventy-three, and in the ninety-seventh year of the Independence of the United States.

Seven words interlined and approved before signing.

JOSHUA CORPREW, *D'y Clerk.*

Pleadings in the following suits in this honorable court against the city of New Orleans, on file, and numbered as follows, to wit: John Crossly and Sons, Ltd., *vs.* The City of New Orleans, No. 9384. State of Louisiana *ex rel.* John Crossley and Sons, Ltd., *vs.* The City of New Orleans, No. 9935. John Crossley and Sons, Ltd., *vs.* City of New Orleans, No. 10337. James W. Peake *vs.* The City of New Orleans, No. 11614.

NOTE.—The above offerings are included in the record of the former appeal already printed, are not to be copied into this transcript here, being governed by the agreement found at page 53 of this transcript.

244 *Ordinance No.* 814.

Administration series.

No. 11557.

MAYORALTY OF NEW ORLEANS,
CITY HALL, *April 27th*, 1871.

No. 814, administration series.

An ordinance to provide for the more efficient drainage of the city of New Orleans and environs and their protection from inundation.

Whereas by the provisions of act No. 30 of the session of 1871 of the legislature of Louisiana it is made mandatory upon the council of the city of New Orleans to provide on the part of the city for an extensive system of drainage, to lay out the lines and fix the location and dimensions of certain canals and levees, and in various ways to recognize the claims and accounts of and to make settlements unto the Mississippi — Mexican Gulf Ship Canal Company in performing the excavations of such canals and building of levees; and

Whereas the council of the city deems certain portion of said bill to put in question the right of the city to the proper control of its drainage system and its rights voluntarily to contract for the work and agree upon a price for the same, and does not recognize the validity or constitutionality of the said act in certain of its parts; yet, convinced of the importance of an effective drainage system, of the desire of the public for its accomplishment without further delay, and satisfied of the capacity and readiness of the said company to perform the work required by the city, it is deemed proper by the council aforesaid, to ordain as follows:

SECTION 1. Be it ordained by the council of the city of New Orleans, That all matters appertaining to drainage and the protection of the city from inundation be placed under the immediate charge of the administrator of improvements, aided by the city surveyor.

SECTION 2. Be it further ordained, etc., That the mayor and administrator of finance shall be associated with the administrator of improvements as a standing committee on drainage, to act until the further pleasure of the council. It shall be the duty of said committee to prepare a plan of work to be entered upon immediately and to report to the council at its first meeting after the adoption of this ordinance what canals and levees or extension of present canals or levees are most urgently required, and upon the approval of the same by the council the administrator of improvements shall authorize the Mississippi and Mexican Gulf Ship Canal Company to enter upon the performance of the said work under its direction.

SECTION 3. Be it further ordained, etc., That the city expressly de-

clares and notifies the Mississippi and Mexican Gulf Ship Canal
245 Co. that it does not waive its right freely to contract for the work of excavating the canals and erecting the levees required with the said company or any other party, as may hereafter appear to the best advantage of the city, and that the directing or allowing the said company to enter upon and perform any portion of the said work laid down is not to be considered as implying their exclusive right to its performance or completion or continuing the same further otherwise than during the pleasure of the council.

That said company is further notified that such work and no other as shall be performed with the consent and approval of the council will be settled for as hereinafter provided.

1. The surveyor shall measure and certify the dimensions of all the canals and levees now existing along the line of the works entered upon, so far as the same may now form part of the canals and levees to be constructed, the same to be allowed for by the company in deduction of their measurements of work performed and completed.

2. The canal work to be measured and certified monthly; the levee work also to be measured and certified monthly, so far as the same shall have been shaped and completed and sufficiently dried for the passage thereon of vehicles, it being the intention hereof that the levees shall have the full dimensions required after being dried and ready for use, and all the payments shall be based upon measurements made of them in that condition.

3. The earth removed from the canals and not required for the levees shall be the property of the city and disposed of as the city may deem proper.

4. The city will issue warrants for the payment of the work, as required by the act of the legislature, and in case of non-realization or non-collection of assets provided for therein the same to bear 8 % per annum interest, the said warrants to be issued with the understanding to be inscribed therein or indorsed thereon that they shall not be enforceable by suit and judgment, but if not paid within one year out of the proceeds of the drainage tax and assets they shall be fundable in bonds of the city bearing eight per cent. interest, payable semi-annually, having ten years to run, and with due provisions for retiring the same and securing the punctual payment of interest and gradual extinction of the principal.

The city shall have power to sell said bonds or give the same for the payment of the work performed; but no sale or exchange shall be made at a price less than eighty cents on the dollar, exclusive of interest, and any holder of a fundable warrant after thirty days' notice, if not paid in money, may demand bonds for the same at eighty cents on the dollar.

5. The payments, certificates, and warrants issued to the said company shall be based upon and computed according to the measurements made as aforesaid.

SECTION 4. Be it ordained, etc., That nothing in this ordinance relating to canals and levees shall be construed as to imply that the

earth taken from a canal and placed on its banks shall con-
246 stitute a levee, but such deposits as the committee may decide to be necessary for levee purposes shall be paid for.

SECTION 5. Be it further ordained, etc., That the city expressly reserves the right at any time hereafter to contest at law or otherwise the constitutionality or validity of act No. 30 of the legislative session of 1871 or any portion thereof, and notifies the Mississippi and Mexican Gulf Ship Canal Company accordingly.

Adopted by the council of the city of New Orleans April 25th, 1871, the veto of the mayor to the contrary notwithstanding.

Yeas—Cockrem, Shaw, Dellassize, Remick, Bonzano.

Nays—Lewis, Walton.

A true copy.

(Signed) H. CONQUEST CLARK, *Sec.*

Ordinance No. 820.

Administration series.

No. 11557.

MAYORALTY OF NEW ORLEANS,
CITY HALL, *May 4th*, 1871.

No. 820, administration series.

Be it ordained, That the Mississippi and Mexican Gulf Ship Canal Company is hereby authorized to commence the following-named work, subject to the terms and conditions of ordinance No. 814, administration series:

1. Cleaning Hagan Avenue canal to a depth of twelve feet, excavating a tail-race canal to connect with Orleans street tail-race, and widening and deepening Orleans tail-race through city park.

2. Excavating Fourteenth Street canal through Metairie ridge, with protection levees on upper side.

3. Widening and deepening Marigny canal from Bayou St. John to Elysian Fields street.

Adopted by the council of the city of New Orleans May 2, 1871.

Yeas—Cockrem, Shaw, Dellassize, Lewis, Walton, Bonzano.

(Signed) BENJ. F. FLANDERS, *Mayor.*

A true copy.

(Signed) H. CONQUEST CLARKE, *Secretary.*

Ordinance No. 944.

Administration series.

MAYORALTY OF NEW ORLEANS,
CITY HALL, *June 29th*, 1871.

No. 944, administration series.

Resolved, That the drainage committee prepare a plan for the construction of a protection levee on or near the lake shore,

247 which, after being approved by the council, shall be the guide for the contractor and surveyor, under the direction of the administrator of improvements, in the execution of the work.

Approved by the council of the city of New Orleans June 28th, 1871.

Yeas—Cockrem, Shaw, Delassize, Remick, Lewis, Walton, Bonzano.

(Signed) B. F. FLANDERS, *Mayor.*

A true copy.

(Signed) H. CONQUEST CLARKE, *Secretary.*

Account of Work Done in Draining Districts, etc.

Recapitulation.

First drainage district	$374,295 25
Second drainage district	974,066 31
Third drainage district	576,565 46½
Fourth drainage district	21,801 00
Miscellaneous	18,024 77
	$1,964,752 79½

NOTE. — The above is copied in lieu of the detailed account of drainage work done by the canal company and Van Norden, taken from city surveyor's books; as per agreement copied at page 53 of this transcript.

Agreement, and act of pledge between Van Norden and the Mexican Gulf Ship Canal Company, and sale of said dredge-boats by the canal company.

Included in record of former appeal, already printed; not to be copied here, as per agreement at page 53 of this transcript.

Assignment and transfer from Van Norden to complainant, filed with bill;

Not to be copied here, being covered by the agreement mentioned above.

Opinion and decree of the supreme court of Louisiana in Davidson *vs.* City of New Orleans, 34th Ann. Rep., pages 170 to 178.

NOTE. — To be read from the printed bound volume.

Deposition of Warner Van Norden, taken under commission dated May 24, 1895, issued from the clerk's office of the U. S. circuit court, eastern dist. of Louisiana, in the case of John G. Warner *vs.* City of New Orleans, No. 12350, which commission was returned and filed July 5, 1895.

STATE OF NEW YORK, } *ss:*
City and County of New York, }

Deposition of WARNER VAN NORDEN, a witness produced, sworn and examined by virtue of the annexed commission, on the 27th

day of June, in the year of our Lord 1895, at No. 25 Nassau
248 street, in the city, county and State of New York, before me, Rufus K. McHarg, a commissioner for the State of Louisiana, residing in the city of New York, duly commissioned and sworn and empowered to administer oaths and take depositions, and acting under and by virtue of the enclosed and annexed commission, issued out of the circuit court of the United States for the fifth judicial circuit, holding sessions in and for the eastern district of Louisiana, in the case in which John G. Warner is plaintiff *vs.* The City of New Orleans, being No. 12350 of the docket of said court, have this day caused the said witness, Warner Van Norden, who resides in the city of New York and is well known to me, to come before me and, having duly sworn him, to answer truly to said interrogatories annexed thereto, he answered as follows, viz:

First interrogatory. What is your name, age, residence, and business, and what was your business in the month of June, 1876?

Answer to first interrogatory. My name is Warner Van Norden. I reside in the city of New York, my age is 53 years; am now president of the National Bank of North America, but was engaged in drainage work in New Orleans prior to June 7th, 1876.

Second interrogatory. State whether or not you were a party to the contract of sale drainage machinery, boats, franchises, etc., made by Warner Van Norden and the Mississippi and Mexican Gulf Ship Canal Company, to the city of New Orleans, executed before Gustave Le Gardeur, Jr., notary public, on or about the 7th day of June, 1876, and, if yes, state the circumstances under which that contract was entered into?

Answer to second interrogatory. I am the Warner Van Norden who was a party named in the act of sale executed before Gustave Le Gardeur, notary public for the parish of Orleans, dated June 7th, 1876, in which I sold and transferred to the city of New Orleans the property and franchise therein described in consideration of the delivery of $300,000.00 in drainage warrants, and the circumstances under which said sale was made were as follows: The officers of the city of New Orleans desired to have charge of drainage construction, believing that they could do it more effectually through the city's engineer. They gave me positive assurances that they would complete the work in accordance with the plan then being carried out, upon which assurances I relied at the time I made the sale above referred to.

Third interrogatory. What knowledge, if any, did you have of the condition and status of the drainage taxes and assessments out of which the warrants given for the purchase price of the property sold to the city under that contract, were to be paid; and state to what extent the condition of such taxes and assessments were discussed before the sale was made, and whether you had any, and what knowledge of the amount of said assessments, and how far that knowledge influenced you to enter into said contract?

Answer to the third interrogatory. At the date of said sale I

knew that a large amount of drainage taxes were due by the owners of private property within the four drainage districts, and by the city of New Orleans for assessments against the public streets and squares in said district. These taxes and assessments
249 were extant on the records of the drainage bureau at the city hall, and on the records of mortgage office of the parish of Orleans, and also on the records of the courts, where the judgments had been rendered approving and homologating the drainage-tax assessments in said districts, as unpaid. The taxes on private property I knew amounted at that time to about $700,000, and that the city of New Orleans was indebted to about the same amount. I ascertained and knew these facts before I consented to sell my property and to receive the drainage warrants in payment of the price, and was advised by counsel that they were legally due and collectable. The state of the drainage fund was discussed with the officers of the city and these amounts were represented to be due, and but for this I would not have made the sale and parted with my property.

Fourth interrogatory. What knowledge, information, or belief, had you or either of you, at or prior to said sale, of any claim, or pretended claim, or offset of the city of New Orleans against the drainage taxes, or any part thereof, out of which the drainage warrants mentioned in said act of sale were made payable?

Answer to fourth interrogatory. Neither at the time of said sale, nor prior thereto, did I have any knowledge that the city of New Orleans had herself, or pretended to have any claim against said drainage-tax fund, in the way of setoff or otherwise, which would in any manner offset my claims to be paid out of the drainage fund.

Fifth interrogatory. What, if any, claim was, at the time of said sale and the delivery of the property in said act of sale mentioned, or at any time prior thereto, set, or made, or mentioned, by the city of New Orleans, or any of the officers of said city, that said city had or pretended to have against the drainage taxes, whether levied against private property or on the streets and squares of the city of New Orleans, against which the drainage warrants in said act of sale mentioned, were drawn and from which they were made payable?

Answer to fifth interrogatory. No claim was made on the part of the city of New Orleans, or any of her officers at the time of or prior to said sale that the city had any right whatever against the drainage fund out of which the purchase warrants were payable, nor did any one intimate that any such right or claim could or would be asserted.

Sixth interrogatory. If you answer that no claim, of any kind was at the time of said sale and the delivery of said property sold, set up, or pretended by the city of New Orleans, either by the issue of the bonds of said city of the "drainage series" issued under act No. 73, of the legislature of the State of Louisiana of the year 1872, or by reason of any other matter or thing, against the drainage taxes, against which the warrants in said act of sale mentioned were drawn, please state, whether or not, if any claim had been as-

serted or pretended by said city, or by any of her officers on her behalf, you would have entered into said sale and delivered your property for said warrants, in said act of sale mentioned?

Answer to sixth interrogatory. If any such claim had
250 been made or even hinted at, whether on account of the issuance of the bonds of the drainage series, or otherwise, I certainly would not have sold my valuable property and rights for drainage warrants payable out of drainage taxes and funds.

Seventh interrogatory. In making said sale, on what did you rely for the payment of the drainage warrants in said act of sale mentioned?

Answer to seventh interrogatory. In making the sale I relied for payments of the warrants on the known condition of the drainage taxes, as stated in my answer to the third interrogatory, and on the express agreement made by the city in the act of sale, that she would not hinder, but on the contrary aid and assist in the collection and application of the drainage taxes to the payment of the warrants.

Eighth interrogatory. When was the first time you learned, if you ever did learn, and how did you learn, that the city of New Orleans had, or pretended to have, any claim or offset against the drainage taxes by reason of the issue and delivery of bonds of the "drainage series," issued under act of the legislature of the State of Louisiana of the year 1872, approved April 26 of that year, being No. 73, against which the drainage warrants given either for drainage work done, or for the purchase and settlement in and by said act of sale was effected and concluded?

Answer to the eighth interrogatory. The first intimation that I ever had from any source that the city of New Orleans had or pretended to have any claim against the drainage fund of any kind was when the case of James W. Peake against The City of New Orleans was decided in New Orleans in the year 1889.

Ninth interrogatory. State any other matter or thing you may know in favor of complainant as fully and particularly as if thereunto specially interrogated.

Answer to the ninth interrogatory. I have subrogated complainant and all other holders of drainage warrants to such rights as I myself had under the contract of sale above mentioned. And I desire to add further, that at the time of said sale I owed the city of New Orleans nothing, but she, at said time owed me between $300,000 and $400,000 for drainage work done, for which she had issued to me drainage warrants which were then due and unpaid, and with this amount due me, I certainly would never have sold my property to her for $300,000 in drainage warrants in addition to the above, had she ever pretended that she had any claim of any kind against the drainage taxes from which the above warrants were payable. (Signed) W. VAN NORDEN.

Subscribed and sworn to before me on this 27th of June, 1895, at the place aforesaid.

(Signed) RUFUS K. McHARG,

[SEAL.] *Commissioner for the State of Louisiana,*
137 *Broadway, New York City.*

251 Deposition of Edward C. Palmer, taken under commission dated May 24, 1895, issued from the clerk's office of the U. S. district court, eastern district of Louisiana, in the case of John G. Warner *vs.* City of New Orleans, No. 12350, which commission was returned and filed on November 25, 1895.

COMMONWEALTH OF MASSACHUSETTS, } *ss:*
County of Plymouth, }

Know ye that EDWARD C. PALMER, of Wareham, in the county and Commonwealth aforesaid, personally appeared before me a notary public, and made answers to certain interrogatories as follows:

First interrogatory. What is your name, age, residence, and business, and what was your business in the month of June, 1876?

Answer to first interrogatory.

1st. My name is Edward C. Palmer; my age is 55 years, and I reside at Wareham, in the State of Massachusetts. My business is president of a mercantile corporation; in 1876 I was a merchant in the city of New Orleans, Louisiana.

Second interrogatory. State whether or not you were a party to the contract of sale drainage machinery, boats, franchises, etc., made by Warner Van Norden and the Mississippi and Mexican Gulf Ship Canal Company, to the city of New Orleans, executed before Gustave Le Gardeur, Jr., notary public, on or about the 7th day of June, 1876, and if yes, state the circumstances under which that contract was entered into.

Answer to the second direct interrogatory.

2d. I was not a party to the contract of sale of June 7th, 1876, between Warner Van Norden and the city of New Orleans, but I am entirely familiar with the transaction, having assisted in the negotiations which led up to the sale, and having received the purchase warrants directly from Van Norden after they were issued. I was also familiar with the drainage operations carried on by said Van Norden as the transferee of the Mississippi and Mexican Gulf Ship Canal Company, and had loaned him large amounts of money in the prosecution of this work, on the security of drainage warrants given for the work done by him, and hence kept a careful watch on the same and made careful investigation of all the drainage taxes from which said warrants were to be paid. The officers of the city of New Orleans were always opposed to this work being done by any one besides themselves and contended it ought to be done by themselves or by parties by them selected and directed, and that it was to the interest of the city of New Orleans to have it so done. Hence the act of the legislature was passed authorizing the city to buy out Van Norden as transferee of the Mississippi and Mexican Gulf Ship Canal Company, and under this act the sale was made, the understanding being that the city of New Orleans would go on and complete the work (at that time ⅔ completed) and make the lands within the various drainage districts valuable and the

252 taxes collectible, to the end that all drainage warrants might be paid, those previously given for work done as well as those given for the purchase of the plant from Van Norden and the company, and upon this fact Van Norden fully relied as well as I did myself, who was a pledgee of his entire plant of dredge-boats and apparatus and in possession thereof. Hence in making the sale I was fully consulted and as familiar with every detail as Van Norden himself.

Third interrogatory. What knowledge, if any, did you have of the condition and status of the drainage taxes and assessments out of which the warrants given for the purchase price of the property sold to the city?

Answer to the third direct interrogatory.

3d. Owing to my having loaned Warner Van Norden large amounts of money on drainage warrants payable out of drainage taxes, I had made myself familiar with those taxes and the amount due. At the time of the sale in 1876 I knew there was due in round numbers one million five hundred thousand dollars of drainage taxes due and payable, of which the city of New Orleans owed for assessments on her streets and squares and other property about six hundred and ninety thousand dollars, and individuals owed the balance for assessments on their property.

I cannot give the exact figures because I have no memoranda or data with me, but the amounts above stated are substantially correct. These amounts I ascertained from the drainage records kept at the city hall in New Orleans, and they also appeared on the records of the mortgage office for the parish of New Orleans and on the records of the courts homologating the assessment sales, and these amounts were examined into and discussed by Mr. Van Norden and myself and the officers of the city of New Orleans before the sale was made. Mr. Van Norden and myself took the advice of counsel on all these matters before the sale was made and we were advised the sums above stated were legally due and collectible for the payment of drainage warrants.

Had it not been for this I would never have relinquished my pledge and possession of his drainage plant and allow the sale to be made, and I know that Van Norden equally relied upon the above amounts being due and payable and applicable solely for the payment of drainage warrants as long as there was a single warrant in existence.

Fourth interrogatory. What knowledge, information, or belief, had you or either of you, at or prior to said sale, of any claim, or pretended claim, or offset of the city of New Orleans against the drainage taxes, or any part thereof, out of which the drainage warrants mentioned in said act of sale were made payable?

Answer to the fourth direct interrogatory.

4th. I had no knowledge, information or belief at or prior to said sale of any claim or pretended claim or offset of the city of New Orleans against the drainage fund or taxes or any part thereof out of which the drainage warrants were payable, of any kind whatso-

ever. Such a thing was never heard of or suggested or intimated or pretended by the officers of the city of New Orleans or any other party or person.

Fifth interrogatory. What, if any, claim was, at the time of said sale and the delivery of the property in said act of sale mentioned, or at any time prior thereto, set, or made, or mentioned, by the city of New Orleans, or any of the officers of said city, that said city had or pretended to have against the drainage taxes, whether levied against private property or on the streets and squares of the city of New Orleans, against which the drainage warrants in said act of sale mentioned, were drawn and from which they were made payable?

Answer to the fifth direct interrogatory.

5th. I have already answered this interrogatory.

Sixth interrogatory. If you answer that no claim, of any kind was at the time of said sale and the delivery of said property sold, set up or presented by the city of New Orleans, either by the issue of the bonds of said city of the "drainage series" issued under act No. 73, of the legislature of the State of Louisiana of the year 1872, or by reason of any other matter or thing, against the drainage taxes, against which the warrants in said act of sale mentioned were drawn, please state, whether or not, if any claim had been asserted or presented by said city, or by any of her officers on her behalf, you would have entered into said sale and delivered your property for said warrants, in said act of sale mentioned?

Answer to the sixth direct interrogatory.

6th. If any claim had been made against the drainage taxes or fund by reason of the issuance of bonds of the "drainage series" or by reason of any other act or thing, or pretended act or thing, Van Norden would never have sold his property for drainage warrants payable out of drainage taxes, and I certainly would not have allowed said sale to be made, as I had the possession and control of all the drainage-boats, tools and apparatus that was sold.

Seventh interrogatory. In making said sale, on what did you rely for the payment of the drainage warrants in said act of sale mentioned?

Answer to the seventh direct interrogatory.

7th. In making the sale Van Norden and myself relied for payment of the drainage warrants in said act of sale mentioned upon the condition of the drainage taxes as they then stood on the records of the city hall, the mortgage office and the courts, without any offset or impairment, which showed an amount due of about one and a half millions of dollars, as well as upon the express covenant contained in the act of sale not to hinder, but on the contrary to assist in the collection of the taxes due, and apply them solely to the payment of drainage warrants.

Eighth interrogatory. When was the first time you learned, if you ever did learn, and how did you learn, that the city of New Orleans had, or pretended to have, any claim or offset against the drainage taxes by reason of the issue and delivery of bonds of the "drainage series," issued under act of the legislature of the State o

Louisiana of the year 1872, approved April 26 of that year,
254 being No. 73, against which the drainage warrants given either for drainage work done, or for the purchase and settlement in and by said act of sale was effected and concluded?

Answer to the eighth direct interrogatory.

8th. The first intimation there ever was from any source that the city of New Orleans pretended to have any claim against the drainage taxes or fund by reason of the issue of bonds of the "drainage series" was when the answer in Peake case was filed in the U. S. circuit court in New Orleans in 1888, but never before, and this was long after the drainage boats had been worn out or sold, and were out of existence.

Ninth interrogatory. State any other matter or thing you may know in favor of complainant as fully and particularly as if thereunto specially interrogated?

Answer to the ninth direct interrogatory.

9th. At the time of the sale I knew Van Norden owed the city of New Orleans nothing, but that the city owed for drainage work done by him over $350,000 in drainage warrants payable out of drainage taxes. He owned his drainage plant, which was then in my possession and control under act of pledge duly recorded in the mortgage office for the parish of Orleans, and I know no sale would have been made to the city of New Orleans had she intimated that she had any claim against the drainage fund of any kind that might in any way interfere with or even prejudice, even in the slightest manner, the payment of the warrants given for said purchase.

(Signed) EDW'D C. PALMER.

COMMONWEALTH OF MASSACHUSETTS, } ss:
County of Plymouth, }

This is to certify that Edward C. Palmer appeared before me at Wareham, Mass., on the third day of July, A. D. 1895, and gave the foregoing deposition, to be used in an action of John G. Warner *versus* The City of New Orleans, No. 12350, before the United States circuit court, eastern district of Louisiana; that prior to his examination the said deponent was duly sworn by me to testify the truth, the whole truth, and nothing but the truth, relating to the cause for which said deposition is taken; that the said deposition was reduced to writing by me; that it was carefully read to the said deponent, and was then subscribed by him; that the said deposition was taken in response to a commission issued May 24, A. D. 1895, signed by "E. R. Hunt, clerk."

Dated at Wareham, Massachusetts, this third day of July, A. D. 1895.

[SEAL.] (Signed) W. L. CHIPMAN,
Notary Public.

COMMONWEALTH OF MASSACHUSETTS, } ss:
County of Plymouth, }

I, W. L. Chipman, notary public in and for the Commonwealth

of Massachusetts, residing in the town of Wareham in said
255 Commonwealth, do further certify that the foregoing answers are given by said E. C. Palmer in my former certificate named, in response to the respectively numbered, first, second, third, fourth, fifth, sixth, seventh, eighth and ninth interrogatories annexed to the commission now hereto annexed, together with said interrogatories, and made part hereof, and that said commission now so annexed, with said interrogatories, is the same commission referred to in my former certificate, dated Wareham, July 3, A. D. 1895, and signed by me on said date, as issued May 24, 1895, signed "E. R. Hunt, clerk," and that said commission and interrogatories were returned to said E. R. Hunt, clerk of the United States circuit court, in July, 1895, in the same package with the answers of said E. C. Palmer to said interrogatories.

I further certify that after taking said deposition I retained the same in my possession until the same was by me sealed up and transmitted by mail, directed to said E. R. Hunt, clerk of said United States circuit court for the eastern district of Louisiana.

I further certify that I am not now and that I was not at the time said deposition of said E. C. Palmer was taken, of counsel for either parties in the cause in which said deposition was taken, nor am I now, nor was I at the time of taking said deposition in any way interested in the event of said cause.

In testimony whereof I have hereunto set my hand and seal this — day of November, in the year of our Lord one thousand eight hundred and ninety-five.

[SEAL.] (Signed) WM. L. CHIPMAN,
Notary Public.

Pledge of Dredge-boats, Marked "A."

Filed Jan. 17, 1898.

Offered by compl't.

Mortgage Office, Book 95, Conventional Mortgages, page 376.

By act of Andrew Hero, Jr., notary public, dated 6th May, 1873—Warner Van Norden, of this city, has affected, hypothecated, pledged, assigned, pawned and delivered unto Messrs. E. C. Palmer & Co., their heirs and assigns, 1st: All and singular those certain-described dredge-boats and derricks, together with their engines, boilers, machinery, furniture, appurtenances, etc., which were acquired from the "Mississippi & Mexican Gulf Ship Canal Co.," by act of said notary, dated 22nd November, 1872, therein fully enumerated and described, and which are known and designated as dredge-boats Nos. 1, 2, 3 & 4, with a steam derrick to each; dredge-boats styled respectively "Ridge boat," "J. O. Noyes" and "Clam Shell dredge," one barge, three flat-boats and five skiffs.

2nd. All the rights and privileges, benefits, advantages, sums of money and immunities conferred upon said Van Norden, or had or to be obtained under the provisions of the contract or agreement, in

reference to the work provided for under act No. 30 of the
256 legislature of this State for the year 1871, made and entered into by him with the said Mississippi & Mexican Gulf Ship Canal Co. before said notary, dated 22nd May, 1872, and 23rd November, 1872.

To secure the sum of one hundred thousand dollars, furnished and advanced by E. C. Palmer & Co. to said Van Norden, in order to enable him to excavate the various draining canals; build and construct the necessary protection levees and to do and perform the work required of him, Van Norden, as assignee of the Mississippi & Mexican Gulf Ship Canal Co. within the present limits of the cities of New Orleans and Carrollton, under the provisions of act No. 30 of the legislature of this State, for the year 1871, entitled "An act to provide for the drainage of New Orleans."

New Orleans, May 10th, 1873.

(Signed) C. DARCANTEL, *D'y R.*

I, the undersigned deputy recorder of mortgages, in and for the parish of Orleans, do hereby certify the above to be a true copy of the original, as recorded in this office in B. 95, p. 376, on the 10th day of May, 1873.

N. O., Dec. 9th, 1897.

[SEAL.] (Signed) G. W. GUINAULT, *D. R.*

(Cancelled law stamp.) (Cancelled law stamp.)

Notice from the Mississippi and Mexican Gulf Ship Canal Co. to the Council of the City of New Orleans, &c.

Office Mississippi and Mexican Gulf Ship Canal Company.

NEW ORLEANS, *March* 14, 1871.

To the council of the city of New Orleans:

I have the honor to inform you that the Mississippi and Mexican Gulf Ship Canal Company is prepared immediately to commence the work of drainage in accordance with the provisions of the seventh section of "the act to provide for the drainage of the city of New Orleans," promulgated this day.

It is desirable that the work should commence at once, in order that the main business portion of the city, that lying between the New and Carondelet canals, the river and the lake, should be protected from overflow before the usual storm tides of September.

(Signed) JAMES O. NOYES, *President.*

City Surveyor's Report to Mayor, &c.

Printed Proceedings City Council, pages 36 and 37.

SURVEYOR'S OFFICE, NEW ORLEANS, *March* 23, 1871.

Hon. F. B. Flanders, mayor.

SIR: In answer to your communication of March 16, 1871, rela-

tive to amount of expenditure required under Mexican Gulf
257 Canal Company drainage bill, I have the honor to report the following approximate estimate:

22,300 lineal feet of canal and levee from the Mississippi river to lake above the city, forty wide by twelve deep, eighteen cubic yards per foot	$401,400
11,220 lineal feet of canal and levee below the city and north of the Metairie ridge, thirty-five wide by twelve deep, fifteen and a half cubic yards	173,910
21,120 lineal feet of canal and levee below the city and south of Metairie ridge, forty wide and twelve deep, and eighteen cubic yards	380,160
22,440 lineal feet canal and levee along lake shore, sixty-five-foot canal and one-foot levee	627,200
505,580 cubic yards of material excavating at fifty cents	252,700
Total cost of canal and levees	$1,934,460

The above estimate comprises seventeen miles of reservoir canals and protection levees and eleven miles of river front inclosing an area of 26,026 acres, or 1,133,692,560 superficial feet, over which area a rainfall of three inches would — 283,423,140 cubic feet of water on the land, which would require six pumping engines having five times the capacity of the present six wheels now in use to discharge the rainfall in ten hours, which machinery would probably cost $450,000, and should be capable of lifting seventeen feet.

The capacity of the canals as proposed would be about 41,194,170 cubic feet; the capacity of the present draining canals and new ones as proposed to be about 28,000,000 cubic feet, making a total reservoir capacity of 69,194,174 cubic feet. Should the lake levee be located a sufficient distance in from the lake shore to protect it from the heavy seas (still some light facing would be required to prevent washing), about four hundred acres would be absorbed for canal and levee, and leaving an unsightly shore outside. I would recommend if a lake levee be built that it be placed as far as possible out in the lake and revetted permanently, the cost of which for 18,700 feet of iron revetment would be $22.50 per lineal foot; complete $420,750.

Relative to the cost of excavating, my experience is in prairie lands. Canals of thirty feet width, ten feet deep, can be excavated with dredges for twenty-five cents per cubic yard. In swamp timber land the cost has been thirty-five to thirty-eight cents per cubic yard—canals thirty-five feet wide, eight to ten feet deep.

The annual cost of running the six proposed pumping engines would not exceed $98,000 per annum, including fuel, engineers, firemen, etc.

In my opinion, a thorough system of open drains, with adequate machinery capable of draining the proposed inclosed area of 26,026 acres, should not exceed in cost $3,000,000.

258 Considerable reduction of area might be made by adopting the Metairie ridge as the rear limit of drainage, the estimate of which system I have not been able to prepare yet.

Upon examination of the report on the proposed system of drainage of the first draining district by Major G. T. Beauregard, then chief engineer of said district, I find he estimates the cost of reclaiming per acre at $98.93, but proposes a levee along the lake shore entirely inadequate to protect the lands. Accepting his estimate as to the cost of reclaiming one acre, this would place the cost of draining 26,026 acres at $2,574,752.

The proposed area to be enclosed between the ridge and lake would be about 7,218 acres. Accompanying this report (for which so short a time has been allowed) find sketches of proposed canals, profiles of levees, and plat of inclosed area; also report of drainage by General Beauregard and two contracts for excavating canals.

All of which is respectfully submitted.

W. H. BELL,
City Surveyor.

Ordinance 814, *A. S.*

Adopted April 21st, 1871, copied already at page 94 of this transcript.

Extract from Proceedings of the City Council under Date of July 18, 1871.

Mr. Cockrem presented the following report:

NEW ORLEANS, *July* 18, 1871.

To the council of New Orleans:

The following plan is respectfully submitted for the approval of the council as the most practical and permanent one for the commencement of a lake-shore protection levee, viz:

Commencing at Upper Line protection levee, extending in the lake to a depth of not over one foot of water at low tide, running in a westerly (easterly) direction to the New canal; also commencing at Pontchartrain railroad, in the same depth of water, running in a westerly (easterly) direction to proposed Lower Line protection levee, being a distance of about two thousand feet.

JOHN COCKREM,
Administrator of Improvements, Member of Drainage Committee.

Cockrem moved the approval of the report and called for the yeas and nays upon it.

The motion to adopt the above report was carried.

Yeas—Bonzano, Lewis, Remick, Shaw and Cockrem—5.

Nays—Walton and Delassize—2.

259

Ordinance 1252.

MAYORALTY OF NEW ORLEANS,
CITY HALL, *December* 13, 1871.

(No. 1252, administration series.)

Resolved, That the city attorney take such legal steps as may be necessary to cause the immediate expropriation of such land and property as may be necessary for the proposed drainage canal from Galvez street to Carrollton avenue, running parallel to the New canal, at a width of one hundred feet from the New canal or State property.

Adopted by the council of the city of New Orleans, December 12, 1871.

Yeas—Cockrem, Shaw, Delassize, Remick, Lewis, Walton, Bouzano.

BENJ. F. FLANDERS, *Mayor.*

A true copy.
H. CONQUEST CLARK, *Secretary.*

Ordinance 1362.

MAYORALTY OF NEW ORLEANS,
CITY HALL, *February* 16, 1872.

(No. 1362, administration series.)

Ordinance amending ordinance No. 820, administration series.

Be it ordained, That paragraphs one, two and three, of ordinance No. 820, administration series, adopted May 2, 1871, be amended and interpreted so as to read as follows:

First paragraph to read:

Excavating a tail-race from Hagan avenue to Orleans street; widening, deepening and extending Orleans tail-race from Bayou St. John to Lake Pontchartrain; excavating the canal parallel to the New canal—authorized by ordinance No. 1250, administration series—and cleaning out and deepening the Hagan, Carrollton, Broad and Galvez Streets canals.

Second paragraph to read:

Excavating the Upper Line canal near the old Carrollton railroad and parallel with the same, with protection levee on the upper side.

Third paragraph to read:

Widening and deepening Marigny canal from Bayou St. John to Elysian Fields street; widening and deepening the London Avenue canal from Broad street to the draining machine; widening and deepening Broad Street canal from Marigny canal to the line of trees on said canal, and widening and deepening St. Bernard Avenue canal from Broad street to Claiborne street.

260 Provided, the council reserves the right to stop any portion of the foregoing work at any point of its progress.

Adopted by the council of the city of New Orleans, February 10, 1872.

Yeas—Cockram, Shaw, Delassize, Remick, Lewis, Walton, Bonzano.

BENJ. F. FLANDERS, *Mayor.*

A true copy.

H. CONQUEST CLARK, *Secretary.*

Ordinance No. 1374.

MAYORALTY OF NEW ORLEANS,
CITY HALL, *February* 24, 1872.

(No. 1374, administration series.)

An ordinance concerning a drainage canal on Poydras street from Galvez street to Carrollton avenue and in relation to the earth excavated of this and other canals.

SECTION 1. Be it ordained by the council of the city of New Orleans, That the contemplated drainage canal on the northeast side of the New canal, as adopted in the proceeding of October, 1871, be so located that the said — be dug out of the middle of Poydras street, commencing at Galvez street, to Carrollton avenue, the earth excavated to be thrown on the lower side of Poydras street.

SEC. 2. Be it further ordained, etc., That the earth excavated from said canal and all other drainage canals between the New canal and Canal Carondelet be used to fill up the Canal Street canal, and, secondly, in grading to a proper level the streets between said canals.

Adopted by the council of the city of New Orleans, February 20, 1872.

Opposition of P. Irwin and Others.

Seventh Dist. Court.

STATE OF LOUISIANA:

Seventh District — for the Parish of Orleans.

No. 9189.

In the Matter of the Commissioners of the First Draining District of the City of New Orleans Praying for the Homologation of the Tableau of Assessment.

Opposition of P. Irwin and others.

Filed January 9, 1872.

To the honorable the judge of the seventh district court for the parish of Orleans:

The several oppositions of Patrick Irwin, Hugh McCloskey, John

Henderson, P. B. O'Brien, Mathew E. Bailey, M. J. Justin,
261 and Mrs. B. Quige, citizens of the United States, residing in the city of New Orleans, respectfully show:

That they are the owners of lots and squares of land within the limits designated in the acts hereinafter referred to as the first and second assessment districts and within the limits of Claiborne street, Metairie ridge, the Canal Carondel-t and the New canal, of the New Orleans Canal and Banking Company, and that they severally oppose the homologation of the assessment-rolls or tableau herein filed for the following reasons:

1st. Because the acts of the legislature of this State of the 18th March, 1858, No. 165, and the act of the 17th of March, 1859, No. 191, are no longer in force, but are repealed by an act of the legislature approved on the 16th day of March, 1870, No. 4.

2d. But even if said acts are not repealed the same are null and of no effect, for this: That said acts contravene the provisions of articles Nos. 105 and 123 of the constitution of this State of 1852, and are in violation of the provisions of arts. 110 and 118 of the present constitution of this State.

And the act of the 17th of March, 1859, was and is likewise repugnant to and in violation of articles 115 and 116 of the constitution of 1852, and contravenes articles 114 and 115 of the present constitution.

That the act of the General Assembly of this State of 1871, No. 30, is likewise in violation of the same articles of the present constitution of this State above mentioned, and all of said acts are repugnant to the Constitution and laws of the United States.

3rd. Your opponents further allege that said acts have remained unexecuted, and the rights, powers and privileges thereby sought to be conferred have been lost by a non-compliance with the provisions thereof; that the commissioners have failed to perform the duties imposed upon them by said several acts, and particularly in this, that they have not constructed the works nor made nor deposited the plan, nor have they given notice by publication, as by the act of 1858 they were required to do, and especially that they have not entered upon the lands included in the district nor marked or designated any lines or canals within the district where the property of the opponents is located.

4th. Your opponents show that their several lots and squares are not now and were not at the time of the passage of said acts swamp lands, but, on the contrary, all of their lands were well drained, and their lands lying between Claiborne street and the Metairie ridge, the Canal Carondelet and the New canal had been thoroughly and efficiently drained by the New Orleans Draining Company, chartered in the year 1835, at the sole expense of the properties of the land embraced within the said limits, which expense your petitioners, or those through whom they derive title have severally paid and discharged, and that, as a consideration for such payment and for the benefit thereby conferred upon the public at large, it was by the 13th section of the act of the 20th of March, 1869, No. 491

provided that the municipalities of the city of New Orleans,
262 in which said section was situated, "shall thereafter maintain the ditches and levees made by the said draining company and the machinery and other works erected by the same on the said sections in good repair and efficient condition, without even laying an extra tax on the lands so drained."

That the attempt now made to levy or impose an assessment or tax upon the property so situated is in violation of said act of 1839, which had and still has the force and effect of a contract, and the said acts of 1858, 1859 and 1871, in so far as they affect the rights secured to your petitioners by said act, are contrary to article 110 of the constitution of this State and to the Constitution and laws of the United States, and are null and void.

5th. That the exemption of the proprietors of the land within the section drained as aforesaid by the New Orleans Draining Company from taxation or assessment for future drainage operations in virtue of the act of 1839 has been often and repeatedly adjudged by the courts of this State, and has been acquiesced in and acknowledged by the commissioners appointed under the act of 1858 and by the city of New Orleans.

And the said commissioners and administrators are estopped from urging the claim herein made in violation of the exemption thus acquired by your opponents as aforesaid.

6th. That this court is without jurisdiction of the several demands made against your opponents on said tableau, and that the demands aforesaid are prescribed for ten years.

Your opponents show that they herewith file their titles to property sought to be subjected to burthens for drainage as aforesaid, which they pray may be taken and considered as a part of this opposition.

Wherefore, they pray that said acts of 1858, 1859 and 1871 may be declared repealed or null and void; that the demand of the administrators herein be rejected, the property and names of your opponents be stricken from said tableau, and said tableau be dismissed with costs, and for general relief.

(Signed) GILMORE & SONS, *Att'ys.*

Opposition of Henrietta Davidson, Executrix.

STATE OF LOUISIANA:

Seventh District Court for the Parish of Orleans.

No. 9189.

In the Matter of the Commissioners of the First Draining District Pray-, etc.

Exception and opposition of Mrs. Henrietta Davidson.

And now, for the purposes of this exception, comes into court Mrs. Henrietta Davidson, widow and testamentary executrix of

263 John Davidson, deceased, and avers that the succession of said John Davidson is now open and under administration in the honorable the 2nd district court of this parish.

Your appearer, therefore, as in duty bound, excepts to the jurisdiction of this honorable court and prays that the application of plaintiffs be dismissed so far as this succession is concerned.

And in the event of said exception being overruled and then reserving all the benefits of said exception on appeal, your appearer, as executrix aforesaid, respectfully opposes the approval and homologation of the assessment-rolls filed herein upon the following grounds:

1st. The various acts passed by the legislation having reference to this subject and upon which this claim is predicated are all unconstitutional, null and void—

(1) Because they provide for a tax which is not equal and uniform throughout the State, and delegate a sovereign power.

(2) Because they violate the constitution of this State, in that their direct effect is to take from the people a power which from time immemorial has been exercised through their local municipal governments and confer it upon the legislature.

That the right to manage their local affairs and administer their property through representatives in their municipal governments is inherent in the people of every State in this Union, antedating their constitutions, and reserved by implication in those instruments.

It also, therefore, violates article 4th, section 4th, Constitution of the United States.

2nd. If said acts be regarded as an exercise of the right of eminent domain they are still unconstitutional, because they violate act. 100 of the constitution of this State, article 105 of the constitution of 1852, and article 5, amendments of 1791, Constitution of the United States, in that they deprive of property without due process of law, and in that they divest vested rights, and that for no purpose of public utility and without adequate compensation made in the manner pointed out in those constitutions.

The claim of plaintiff is based ultimately upon the statutes of 1858, 1859 and 1861, passed under the State constitution of 1852, under which a devestation of vested rights could only take place for adequate compensation previously made.

That the claim of the assessment is made in advance of a performance of the work and before there can be even a pretense that a benefit has been already conferred upon the property or person assessed.

3rd. Whether said assessment be the exercise of the right of eminent domain or merely that of police power, the legislature can have no right more than the lowest sum for which the benefits could be conferred on the property; consequently, not more than the sum for which individuals, the city, or the State could have attained the accomplishment of the said benefit.

The assessment herein claimed is to be paid out at the rate of 50 cts. per cubic yard for excavation and 50 cts. per cubic yard for

levees or to meet the payment of certificates, one of which is
264 hereto annexed, marked "B" and made part hereof; and the truth is that the board of administrators could have obtained the performance of this work at much less cost.

4th. Because the effect of the homologation herein sought is to appropriate the property of individuals, on the one hand, and illegally confer it on corporations on the other.

This oppression and confiscation, as will be shown on trial hereof, has been exercised heretofore and is herein again attempted under color of law.

5th. Because the homologation is to operate as a judgment "against the property assessed and the owners thereof, on which execution may issue as on judgment rendered in the ordinary mode of proceedings."

Many superficial feet are not worth the amount of the assessment. Any such judgment, therefore, violates articles 5th, 13th and 14th of the amendments of the Constitution of the United States and articles 2d, 3d and 110th of the constitution of the State, as it creates a personal servitude, exacting the fruits of personal labor, as it takes private property for public utility without just compensation, without due process of law, and abridges the privileges and immunities of citizens.

6th. Because under the drainage acts this proceeding is irregular and unwarranted, even if such acts were constitutional, which is denied. No assessment-roll can be filled until a demand is made for an instalment, which shall not exceed ($\frac{1}{10}$) one-tenth of the entire assessment, and not more than one instalment can be called for during one year.

The judgment herein sought is for over $450,000, while the acts do not allow a larger assessment than to realize the sum of $350,000.

The amounts already realized in the first draining district, including property certificated, reach $300,000, leaving a balance of not more than $50,000 to be claimed in said district in any view of the case.

7th. That the act of 1839 distinctly recognizes the constitutional objection to the levy of this assessment in advance of the drainage of the district and undertakes to provide a means of escape from the difficulty.

The money necessary for drainage purposes under the provisions of the act may be raised by issuing bonds, which bonds were in the contemplation of the act, only to be redeemed as the work progressed.

These bonds have never been issued, but an assessment is now sought to be enforced to meet both their principal and interest and that without the benefit which it was contemplated would accrue from the use of the money which said bonds were to realize.

8th and lastly. Your appearer adopts all the oppositions made by W. O. Denegre and Patrick Irwin, as far as applicable to this case and not inconsistent with anything heretofore alleged, and pleads the prescription of ten years.

265 Wherefore your appearer prays that the demand of the board of administrators, etc., to have this assessment-roll homologated be disallowed and rejected so far as it affects the succession of John Davidson or property standing in his name and as shown by the annexed list marked "A" and made a part of this opposition, and appearers pray for all general and equitable relief, and will ever pray, etc.

(Signed) H. N. OGDEN,
Att'y for Executrix.

List of Property Marked "A," Annexed to Exceptions.

1st district. Square 16—Fulton, Peters, Poydras and Lafayette.
Square 18—Fulton, Peters, Girard, and Norteu Daene.
Square 216—St. Charles, Carondelet, Julia and Gerard.
Square 220—St. Charles, Carondelet, Paydras and Lafayette.
Square 629—Palmyra, Banks, Dupre, Gayoso.
Square 655—Palmyra, Banks, Salcedo, Lopez.
Square 729—Palmyra, Banks, Telemaque, Cortez.
2d district. Allen place—Metairie road, Bayou St. John and New Canal property.
Square 459—Toulouse, St. Peters, Hagan avenue and Bayou St. John.
1st district. Square 328—Franklin, Liberty, Julia, Girod.

Statement showing the total assessment levied, at $3\frac{3}{10}$ mills, in the first drainage district, from Julia to St. Peter St. and Carondelet walk and from the Mississippi river to Lake Pontchartrain.

Sec. 1st. Between river and Claiborne St.:			
Individuals	56,217 24		
City of New Orleans	2,507 08		
U. S. custom-house	327 63		
University of Louisiana	204 32		
		59,256 27	
City New Orleans, streets		31,421 19	
			90,677 46
Sec. 2d. Between Claiborne St. and Metairie R'd:			
Individuals	151,954 50		
City of New Orleans	105 80		
		152,060 30	
City of New Orleans, streets		79,690 09	
			231,750 39
Sec. 3d. Between new & old Metairie R'd:			
Individuals	4,489 33		4,489 33
Sec. 4th. Between Metairie road and the lake:			
Individuals	97,085 27		
City of New Orleans (city park)	16,792 55		
Different asylums, &c	167,605 10		
		281,482 92	
City of New Orleans, streets		143,001 70	
			424,484 62
Total am't of assessment, 1st dr'g dist			$751,401 80

266 Opinion and decree of the supreme court of Louisiana in the matter of the Commissioner- of the First Drainage District, contained in the 27th Annual, pages 20 to 25. Offered in connection with oppositions.

To be read from the La. Ann. Reports.

Petition of Appeal of City of N. O., etc.

Extract from Transcript of Supreme Court Louisiana, No. 4338, page 113, and following of volume 2.

STATE OF LOUISIANA:

Third District Court of the Parish of Orleans.

No. 17028.

In the Matter of the Commissioners of the First Draining District Praying for the Homologation of Assessment-roll.

Petition of appeal of the city of New Orleans. Filed October 3, 1863.

To the honorable the judges of the third district court of New Orleans:

The petition of the City of New Orleans (a corporation by the laws of Louisiana) respectfully shows that there is error to the prejudice of said city in the final judgment rendered in said case on the 11th of March, 1863, and signed March 17th, 1863, against said city for the sum of seventeen thousand four hundred and forty-two $\frac{29}{100}$ dollars and two thousand four hundred and thirty-one $\frac{94}{100}$ dollars, as appears from said judgment and tableau filed in said case, and that petitioner is desirous of taking a suspensive appeal to the supreme court of the State.

Petitioner further shows that by law petitioner is exempt from giving bond and security in all judicial proceedings.

Wherefore, the premises considered, petitioner prays that a suspensive appeal be allowed said city in said case, returnable before the supreme court of the State of Louisiana, returnable according to law; that plaintiffs be cited, and for all equitable and general relief in the premises.

(Signed) J. MADISON DAY, *City Att'y.*

Order for Appeal by City.

A devolutive appeal is allowed in this case, returnable to the supreme court the first Monday of November next, the appellant being dispensed by law from giving bond in the sum of — dollars.

New Orleans, Oct. 3d, 1863.

(Signed) J. S. WHITAKER,
Judge of the Second District Court Acting in the Absence of the Judge of this Court.

267 STATE OF LOUISIANA:

Third District Court for the Parish of Orleans.

No. 17028.

In the Matter of the Commissioners of the First Draining District Praying for the Homologation of Assessment-roll.

Citation Served on Plaintiffs through Their President, G. Ingraham.

To the Commissioners of the First Draining District of New Orleans, through their president, George Ingraham, Greeting:

Whereas the City of New Orleans has on the 3d day of October, 1863, filed in the office of the clerk of the third district court of New Orleans a petition of appeal from a certain final judgment rendered in the said court against it, which appeal is returnable in the supreme court for the State aforesaid on the first Monday of November, 1863.

You are therefore cited to appear in person or by attorney in said court on the day last aforesaid to answer to the said appeal.

Witness the Honorable Ezera Hiestand, judge of the court aforesaid, this third day of October, in the year of our Lord one thousand eight hundred and sixty-three.

(Signed) J. A. MERTAGH, *D'y Cl'k.*

Sheriff's Return on Foregoing Citation.

Received October 6th, 1863, and on the same day, month, and year served a copy of the within citation and accompanying petition of appeal on The First District Draining Company, the plaintiffs herein, by personally handing the same to Geo. Ingraham, their president, whom by interrogation I know to be such.

Returned same day.

(Signed) H. NIXON, *D'y Sheriff.*

Certified Copies of the Docket Entries of the Supreme Court of the State of Louisiana in No. 4338.

Supreme Court of the State of Louisiana.

CLERK'S OFFICE, NEW ORLEANS, *February 8th*, 1888.

Extract from Fee Book No. 8.

In the Matter of the Commissioners of the First Draining District Praying for the Homologation of the Assessment-roll, etc., etc.

4338, $20.00.

Geo. S. Lacy, city attorney, for pet'r & Roselius & Philips; W. O Denegre (city appellant).

1872.

Oct. 31.	Filing record from the 7th dist. court for the parish of Orleans, No. 9189.....	$2.00
	Docketing.....	1.00
	Filing documents marked A & B (2).....	.50

May	21.	Filing motion and certificate for extension.....	.50
		Recording on the minutes.....	1.00
1873.			
Febr'y	17.	Filing order to place case on S. docket.....	.25
	24.	Called and fixed for March 14, 1873.....	1.00
March	7.	Filing briefs for def'ts and app'ts..	1.75
	7.	Filing briefs for the appellant....	1.75
	14.	Continued by pref.	.50
	24.	Called and fixed for April 12, 1873.....	.50
April	4.	Filing briefs for appellees.....	1.40
	12.	Called	.50
April	12.	Argued and ordered....	.50
		Submitted (7 days).....	.50
		Filing act of legislature marked Y.....	.50
		Filing briefs for city.....	1.40
		Filing briefs for Davidson.....	1.40
	19.	Filing sup. briefs for Davidson's estate.....	1.40
1873.			
Dec.	12.	Final decree.....	1.50
		Filing opinion.....	.25
	11.	Filing briefs on rehearing.....	1.75
	15.	Rehearing granted (*ex proprio motu*).....	1.50
		Filing pet. for rehearing..... .	.25
		Filing motion for time and order	.25
		Recording motion on the minutes.....	1.00
		Called and fixed for Jan'y 7th, 1873..... ...	1.00
1873.			
Dec.	26.	Filing briefs on rehearing.....	1.75
		Copy of opinion for Lacey, city att'y.....	5.00
Jan'y	3.	Filing briefs for rehearing	1.75
	7.	Filing order to submit.....	.25
		Filing briefs for city on rehearing.....	1.75
		Called.....	.50
		Submitted.....	.50
	17.	Filing briefs on rehearing.....	1.75
1874.			
Feb.	9.	Final decree on reh.....	1.50
		Final opinion.....	.25
		Recording.....	8.00
		Certified copy to lower court.....	6.60
		Sent by Tom Hyman, d'y cl'k..... ...	$55.75
Feb.	16.	Filing writ of error.....	.25
1875.			
July	5.	Doc's A & B delivered to Blanc, ass't city att'y, receipt on file.	

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1876.

Sept. 4. Rec'd record per S. P. Blanc, city att'y.
5. Record returned by Blanc, att'y, signed Jno. Grashoff.

Dec. 17. Rec'd record, signed S. B. Blanc, per C. Wesser.
Record returned 30 May, 1878.
Rec'd record Feb. 21, '79, signed F. N. Baker.
Ret'd Mar. 26, '79.

UNITED STATES OF AMERICA, }
State of Louisiana. }

Supreme Court of the State of Louisiana.

I, George Augustin, deputy clerk of the supreme court of the State of Louisiana, holding sessions in the city of New Orleans, hereby certify the foregoing three (3) pages contain a true, full, and faithful copy of all the entries recorded in Fee Book No. 8, now in this office, in a certain suit entitled " In the matter of the Commissioners of the First Draining District praying for the homologation of the assessment-roll," &c., &c., which said suit is on the files of this court under No. 4338.

In testimony whereof I have hereunto set my hand and affixed the seal of this honorable court this 8th day of February, A. D. 1888, and in the 111th year of the Independence of the United States of America.

[L. S.] (Signed) GEO. AUGUSTIN,
Deputy Clerk.

168. Deposition of L. J. Fremaux before examiner. Copied at page 870 of this transcript.

102. *Copy of Order of Third District Court in Suit No.* 17028.

STATE OF LOUISIANA:

Third District Court for the Parish of Orleans.

No. 17028.

Commissioners of the First Draining District Praying for the Homologation of the Assessment-roll.

Order Correcting *fi. fa.*, &c. Filed Aug. 1st, 1863.

On motion of C. Roselius, of counsel for the Board of Commissioners of the First Draining District, on giving the court to understand and be informed that in issuing an execution in this case the clerk of the court has committed a clerical error by substituting the name of Charles Genois in lieu of that of Jean Genois—

It is ordered that the sheriff return said writ of *fieri facias* thus erroneously issued, and that a correct writ of *fieri facias* be issued against the proper party in accordance with the judgment.

270 And on further suggesting to the court that another clerical error has been committed by the clerk in drawing up the judgment in this case by using the word "or" instead of "and," it is now ordered that said error be now corrected.

103 *and* 104. *Certificates of the Clerk of the Civil District Court, Parish of Orleans, and Supreme Court of the State of Louisiana.*

In the Matter of the Commissioners of the First Draining District Praying for the Homologation — Assessment-roll.

No. 17028.

C. Roselius, Wm. H. Hunt.

1863.			
Feb.	5.	Petition and roll	.20
		4 notices in French — English	3.00
		Order for publication	.30
Mar.	7.	Opposition of N. E. Bailey	.10
		Do. W. O. Denegre	.10
	11.	Proof of publication	1.25
		Order of homologation and 5 newspapers	2.25
		Copy of homologation	.75
			$7.95
Mar.	30.	*Fi. fa. vs.* New Orleans Nat'l *and* Banking Company, list of property	15.00
		Am't for'd	$22.95
Paid $15.			
May	25.	E. W. Sewell, paid O'ber 3, '63	3.00
		G. L. Riddell, paid	3.00
		Mrs. Ladlow and Mrs. Foley, treasurer and president of Female Orphan Society, paid Nov. 30, '63	3.00
		Asylum for Destitute Orphan Girls	3.00
		Heirs of Lavergne	8.00
		Chas. Genois	3.00
		Heirs of Ch's D. Moran	3.95
June	2.	Dr. McPherson, president of the Society for the Relief of Destitute Orphan Boys, p'd	3.00
		F. Buisson, president of the Society of Destitute Boys	3.00
	12.	Order & copy & app. curator *ad hoc* to Chas. Genois	1.50
		Do. to heirs Moran	1.50
		Do. to heirs Lavergne	1.50
	15.	Returns of rule	.30
July	22.	Order allowing cur. *ad hoc* $25 in case of Genois.	.50
		Order allowing cur. *ad hoc* $25.00 in heirs of Moran	.50

271		Order allowing cur. *ad hoc* $25.00 in heirs of Lavergne	.50
Oct.	3.	Petition for appeal by city	.10
		Order	.75
		Copy of pet., cit., & copies	2.50
Oct.	6.	Sheriff's return of cit	.10
Dec.	12.	*Fi. fa. vs.* John Davidson	5.00
1865.			
Aug.	24.	Sheriff's ret. of *fi. fa. vs.* S. Locke	.10
		J. Davidson	.10
		Jos. Genois	.10
		Dest'te Orphan Boys	.10
		McPherson	.10
		Heirs of Moran	.10
		Chas. Genois	.10
		Heirs of Lavergne	.10
		Asylum for Des. O. Boys	.10
		Mrs. Laidlaw, &c	.10
1868.			
Ap'l	11.	Order for papers	.50
1871.			
Dec.	1.	Motion to transfer case to 7th D. ct	.50
Dec.	1.	Extracts from minutes	2.00

Received the record in this case for transfer to the 7th dist. court. Dec. 2, '71.

(Signed) RUFUS WAPLES,
Att'y for City and Adm'rs.

Ordinance No. 6970 *and Proclamation.*

No. 6970, administration series.

Be it resolved, That the mayor be authorized to issue his proclamation advising the people not to pay the drainage tax until the question is decided by the supreme court.

Adopted by the council of the city of New Orleans April 5, 1881.

Yeas—Delamore, Fegan, Fitzpatrick, Guillotte, Huger, Mealey, Walshe.

JOSEPH A. SHAKESPEARE, *Mayor.*

Proclamation.

MAYORALTY OF NEW ORLEANS,
CITY HALL, *April* 6, 1881.

All persons of whom a tax for drainage in the city of New Orleans is demanded are hereby advised not to pay said drainage tax until the right to exact said tax has been settled by decision of the supreme court of this State.

(Signed) JOS. A. SHAKESPEARE, *Mayor.*

272 Deposition of D. M. Brosnan, copied at page 71 of this transcript.

Deposition of Samuel D. Moody, copied at page 74 of this transcript.

Opinion and judgment of the supreme court of Louisiana in the matter of the Commissioners of the First Draining District praying for a homologation of the assessment-rolls, &c., No. 4338, 27 La. Ann., pages 20 to 24, and opinion and decree of the Sup. Court U. S., Davidson *vs.* New Orleans, 96 U. S., p. 97 and following, and both as contained in the printed reports and not filed in court.

Copy of Opposition of Mrs. Rey.

Filed in seventh district court, &c.

Extract from Record No. 9189, Seventh Dist. Court, and No. 4338, Supreme Court, of Louisiana, p. 181, 182, 183, and 184.

STATE OF LOUISIANA:

Seventh District Court for the Parish of Orleans.

No. 9189.

In the Matter of the Commissioners of the First Draining District Praying, etc.

Opposition of Mrs. Rey. Filed January 26, 1872.

To the honorable the seventh district court, parish of Orleans:

The petition and opposition of Mrs. Widow F. Rey, of this city, owner of a certain landed property situate, being and lying within St. Peter to Julia and the river and Claiborne streets, to the tableau of assessment filed by said commissioners, with respect represents:

1. That the judgment giving a privilege to said commissioners for said tax and the authority to enforce the same is prescribed by the lapse of ten years.

2. That by law the costs of the draining cannot exceed $350,000, when twice that amount is claimed.

3. That no work of any kind has been made by said commissioners or other persons towards the drainage of the city and its protection against overflow as contemplated by law, and that no claim can be set up against the owners of property for the price of work which has not been done, and if the law permits it said law is unconstitutional, null and void, and that as a tax it is unconstitutional, not equally assessed upon all the property of the inhabitants, owners of property within the assessment districts.

4. That plaintiffs are not entitled to a judgment in *personam*.

5. That the law upon which plaintiffs base their demand is not and never has been a law of the State, the constitutional requirement having not been complied with to give it authority of law, and it never having been signed by competent authority.

273 Wherefore petitioners and opponents pray that this opposition be filed, that this opposition be sustained, and that plaintiffs' tableau, claims, &c., be dismissed and declared to be illegal, null and void, and with costs.

And as in duty bound, &c., &c.

(Signed) A. ROBERT, *Of Counsel.*

Map of Drainage Sections in Connection with the Testimony of A. C. Bell, Showing the Work Done.

Note as to above offer:

Map to be transmitted along with this transcript of appeal, in the original, to be used by the court of appeals, as part of the record.

Map of Complainant No. 2 of the Lake-shore Front, etc.

Note as to above offer:

The map is to be transmitted along with this transcript of appeal, in the original, to be used by the court of appeals, as part of the record.

In accordance with agreement copied at page 53 of this transcript.

United States Circuit Court, Eastern District of Louisiana.

JAMES W. PEAKE
v.
CITY OF NEW ORLEANS. } No. 11614.

Testimony taken in the above case on the part of complainant before O. B. Sansum, Esq., master, the complainant being represented by Richard De Gray and the defendants being represented by Messrs. White and Saunders.

My name is Samuel D. Moody; I am forty-eight years old; I live in Harrison county, Mississippi, but I do business in New Orleans, 120 Carondelet street, and my business is a money broker.

I was general superintendent of the Mississippi and Mexican Gulf Ship Canal Company during the years 1872, 1873, 1874, 1875 and 1876. I continued in that position until June 6th, 1876, at which time the dredge-boats were sold by that company and by W. Van Norden, transferree, to the city of New Orleans. I was familiar with all the drainage work that was done by that company and by the transferree.

(Complainant's map 1, O. B. S., ex., April 5th, 1888, is here shown to the witness, and being asked whether he recognizes the said map he states): I recognize this as the map of the draining sections of New Orleans.

The blue lines on the map represent canals that were deepened and widened while I was the superintendent. The red lines on the map represent new canals excavated. The yellow lines on the map represent the embankment road and levees built during the same period of time.

274 The protection levee on the lake front at West End was one hundred and twenty feet wide at the base, and at the highest point was fourteen feet six inches high. This levee was built from the New basin to the Upper protection levee, and from the last-named point the Upper protection levee was built to within a few squares of the river at Carrollton. The base of the Upper protection levee was eighty-two feet and the highest was eight feet five inches. The draining canal inside the Upper protection levee was sixty-five feet wide. The Lower protection levee was built from Lake Pontchartrain to Florida walk; then it turned into Florida walk about one-third of a mile. Inside the Lower protection levee there was a canal similar to that which was inside the Upper protection levee. All the canals that were deepened, widened, and new ones excavated, as shown on the map referred to, are now in use in draining the city of New Orleans. I know of no other canal or protection levees built since that time.

The coloring on the map—blue, red and yellow colors—shows correctly the condition or extent of the work done by the company and its transferree, except the yellow lines along the New Orleans canal, which indicates an embankment or road which was not built by the company or its transferree, and this was the condition of the work at the date of the transfer, in June, 1876.

Of all the work designed for the draining, about two-thirds was completed at the date of the transfer.

As superintendent, I had charge of all the dredge-boats, machinery, tools and appliances needed in the work of draining. There were seven dredge-boats, four derricks, one steamtug, and duplicate pieces of machinery for each dredge-boat. The dredge-boats and derricks were in good condition at the date of the sale.

We kept the dredge-boats up like new boats all the time. Whenever any of the machinery got out of order or was broken we had others of the same kind always kept on hand to replace these that were broken. If the dredge-boats and machinery had received the care we gave to them they would have lasted a very long time. Giving them proper care, the boats would have lasted ten years, in my judgment.

The dredging that was done by these dredge-boats while I was superintendent was through cypress swamps, which is very difficult, because very large stumps have to be taken out, and they are close together with large roots.

Cross-examination by Mr. Saunders is waived.

Re-examination:

The derricks were used to receive the dirt from the dippers of the dredges and to put it farther away than the dippers could carry it.

And on the 23rd day of April, 1888, complainant being represented by said Richard De Gray, and the defendants being represented by Harry Hall, Esq., the proceedings hereinafter stated were had in said cause as follows, to wit:

275 My name is Louis La Rogue. I am fifty-three years old. I live in the city of New Orleans, 164 Kerlerec street, corner of Robinson street. My business is clerk. In December, 1868, I was appointed secretary of the first draining district by the board of commissioners of that district, and in that capacity I had charge of collections of the drainage assessments for that district. I continued in that capacity until the city of New Orleans became the succession of the drainage commissioners in all the draining districts—as I understand it, of the first, second and third draining districts. There was the fourth draining district subsequently created, but I do not remember how that was created. The city of New Orleans became the successors of the draining commissioners under act (No. 30) thirty of the year 1871; then I was appointed assistant of Mr. Mayo, and assisted in collecting the drainage taxes in all the draining districts. I continued in that business until June, 1876. In June, 1876, Mr. James B. Guthrie became the collector of the drainage taxes in all the draining districts and he has continued in that official position until the present time. From the time Mr. Guthrie became the collector of the drainage taxes I have been his clerk or assistant in that business and remain so to the present time. From the time I became assistant, as I have mentioned, and to the present time I am very familiar and well acquainted with the assessment-rolls for the drainage taxes in all the draining districts.

In the course of collecting drainage taxes—any person against whom drainage taxes had been assessed came to make payment the usual practice was to give a receipt for the amount of the tax and at the same time to mark the tax paid on the roll. So far as the assessments against the city of New Orleans for drainage taxes are concerned no receipt for any payments thereof by the city have been given, as far as I know, and no entries upon the assessment-rolls indicating such payments have been made, and the assessment-rolls remain in the same condition now as they were when the assessment-rolls were homologated by the judgment of the court, except a few squares of land in the first draining district, which were sold by the city, and the drainage taxes were paid by the purchasers. These taxes paid by the purchasers amount to between twelve hundred and fourteen hundred dollars; in all other respects the assessment-rolls as against the city are in the same condition as when they were first homologated.

Cross-examination by Mr. HALL:

The assessments against the city for taxes against the streets are stated on the rolls in each district in one entry in some districts and in two entries in some other districts; in nearly all the districts the taxes for the streets are put down in one entry. In these entries are embraced the aggregate superficial feet of all the streets of the districts and the amount of the tax. Whenever a debtor of a drainage tax made a payment on account of the tax an entry was made corresponding with each payment. The money was always

paid to Mr. Mayo. No entry was made on the book indicat-
276 ing the payment of drainage taxes unless the money was paid or a drainage warrant was delivered in place of the money to us in the office. The books were kept and the entries were made on them solely for the purpose of showing the drainage taxes actually paid into that office, either in money or in drainage warrants. We kept no account of anything paid elsewhere.

Re-examination:

There was a department in the city hall known as the bureau of drainage, which was a part of the office of the administrator of public accounts, now known as the city controller. All payments of drainage taxes made to Mr. Mayo or myself were entered upon the books. I know of no payments of drainage taxes made to any person but Mr. Mayo or myself that were not entered upon the rolls. All payments so made were entered upon the rolls. Mr. Mayo was the person who kept the account and made all entries upon the rolls; that was his business exclusively. (The defendants here admit and require no proof of the fact that Mr. Mayo, the person referred to by the witness, is now a very old man, and that he cannot now make any clear or intelligent statement as to the matters referred to in the witnesses' testimony.)

L. LAROGUE.

SAMUEL BIRCHFIELD, sworn on behalf of the complainant, says:

By Mr. DE GRAY:

Q. Give your name, age, residence and occupation.

A. My name is Samuel Birchfield: my residence, 396 Bienville Str.; my age is 64 years, and my business is that of engineer.

Q. How long have you lived in New Orleans?

A. I have been here since 1853 permanently.

Q. Have you had any connection with the drainage?

A. I have been engineer on the drainage machines since 1864. I was employed there ever since until May, 1888.

Q. Are you familiar with the land that is being drained by the drainage machines with which you have been connected?

A. Since 1868 I have been on the Bienville draining machine in this section.

Q. Are you familiar with the drainage canals, protection and revetment levees that were built by the Mississippi and Mexican Gulf Ship Canal Co. and by Mr. Van Norden?

A. There was a Doctor Noyes connected with it. Yes, sir; they had the drainage-boats working at the canals while I was there.

Q. You have been over all the canals made?

A. No, sir; only in this section—the first drainage district.

Q. What is the condition of these canals now?

A. They are in a terrible condition at the present time.

Q. In what respect?

A. They are filled up with mud.

Q. Largely or to a small extent?

A. Well, they are filled up to a very large extent.

277 Q. What effect does that have upon the drainage?

A. It tells greatly. There is no reservoir for the heavy rains. The water cannot reach the draining machine as it ought to.

Q. Do you remember when the city or the company that was digging the canals and building the protection levees ceased working?

A. I remember the time, but I cannot state it positively.

Q. In 1875?

A. Yes, sir.

Q. Has there been anything done in the way of digging the canals or building the levees since 1876?

A. Nothing more than repairing the levees, I believe.

Q. Has there ever been any protection levee built on the lake front from the West End to the Lower protection levee?

A. No, sir.

Q. There has never been any protection levee built?

A. No, sir; none whatever.

Q. There being no protection levee on the lake-shore front, how is the land protected in the rear of the city, if it is protected at all, from the storms and water from the lake?

A. Well, the Metarie ridge forms a levee. I do not think the water ever comes over that ridge. The overflows that we have had from the lake were caused from the navigation canals more than anything else.

Q. The water comes into the navigation canals and overflows that way?

A. Yes, sir; the levees are imperfect.

Q. Are you familiar with the plan of drainage that was carried on and adopted by the city under Mr. Bell as engineer?

A. No, sir; I cannot say that I am. I think his plan was a good one if it was carried out.

Q. You knew what his plan was?

A. Yes, sir; a protection levee along the lake-shore front.

Q. If that protection levee had been built along the lake-shore front and the locks put in as they were laid down on the map and the plan, the navigation canals also protected by locks, and pumping stations had been erected on the levee lake front to throw the water out, what effect would it have, in your judgment, upon the draining of the land?

A. I do not know, but I think the land would have been worth 4 or 5 times as much as it is now.

Q. What effect would it have?

A. It would have a good effect.

Q. Would it have drained the land?

A. Yes, sir; it would if they had draining machines enough to take the water off.

Q. When land is drained, the water thrown off from it, and it —cultivated, does the land of itself rise?

A. I think so.

Q. Do you know how much?

278 A. No, sir.

Q. You know the fact that it does rise?

A. Yes, sir. I have a piece of land at the draining machine myself and it looks to me to have risen.

Q. It rises by cultivation?

A. Yes, sir.

Q. Are you the owner of any land beyond Claiborne street?

A. Yes, sir; I have three pieces beyond Claiborne street.

Q. Where are they situated?

A. One at the corner of Galvez and Canal streets, one on Bienville street, between Johnson and Galvez streets, and I have got a piece out fronting on St. Louis between Clarke street and——

Q. Has land increased or decreased in value out there?

A. It has decreased in value ½ in 10 or 12 years on account of the overflow.

Q. Is the drainage system in its present condition able to drain the land or not?

A. No, sir; it is not able to drain the land. The machines are 100 years behind the age. In all the machines they have got in the city there is no improved one. The machine that they have there was built in 1835. That is the Bienville machine.

Q. All these canals then being full, do they or not form any reservoir for the water during rain?

A. Very little reservoirs. The Galvez and Broad Street canals are within 12 inches of being full and even with the surface of the land.

Q. If the drainage system was completed in its entirety and protection levees built upon the lake, could all these lands be rendered dry and valuable, if the system was complete and the proper machinery put in?

A. Yes, sir; the land would have been more valuable than it is now. It is worth nothing now.

Q. I mean the system complete, according to the plan?

A. Yes, sir; I understand you.

Cross-examination by Mr. HALL:

Q. You spoke of the depreciation of the lands within the last 10 years. What was that occasioned by?

A. By the overflow from the lake.

Q. Did you not have overflows before that?

A. Yes, sir; we had overflows in 1871 and 1872 by the breaking of the levees.

Q. Has not the land back there always been liable to overflow?

A. No, sir; not if the levees did not break, unless we have extraordinary heavy rains and the machines get out of order.

Q. What levee do you speak of?

A. The levee between the two canals, the Old basin and the New basin.

Q. How much protection levee did they ever build?

279 A. They only built from the West End to the Upper Line canal.

Q. Now, when you say that these canals are filled, what canals do you refer to?

A. This district, the Galvez Street canal and the Broad Street canal; in fact, all the canals in the city have been filled with filth, as they have not been cleaned out for a number of years.

Q. You do not mean the large reservoir canals or the draining canals?

A. I mean the Galvez Street, the Broad Street, the Poydras Street and the Hagan Avenue canals. One draining machine takes the water out, and yet you can see the mud at the bottom. That canal was formerly dredged out 17 feet, and the Orleans canal was dredged out from Bayou St. John.

By Mr. DE GRAY:

Q. How deep is the Hagan Avenue canal now?

A. I do not think it is over 4½ or 5 feet below the surface of the land.

Q. When it was originally dredged it was 17 feet?

A. Yes, sir; 17 feet.

By Mr. HALL:

Q. When was that canal built originally?

A. Well, it must have been about 1872 or 1873.

E. H. CHADWICK, sworn on behalf of the complainant, says:

By Mr. DE GRAY:

Q. Where do you live?

A. At the corner of Canal and Broad streets.

Q. What is your business?

A. I am a real-estate agent.

Q. What is your age?

A. I am about 50 years old.

Q. How long have you been living in New Orleans?

A. About 41 years.

Q. Are you familiar with the drainage system as laid down in the act No. 30 of 1871, under which the plan was adopted by the city of New Orleans at the time Mr. Bell was city surveyor?

A. No, sir; I never saw it. I had frequent conversations with Mr. Bell about the plan that was being carried out. At that time I was very busy with other things, and I did not have a chance to see the work.

Q. You are familiar with the design of the drainage of New Orleans, with a protection levee about the city, with a revetment levee on the lake-shore front, with a protection levee above, and the various canals?

A. Yes, sir; we talked about them.

Q. Are you an owner of land within this territory?

A. Yes, sir.

280 Q. Where is it situated?

A. There are so many pieces I cannot tell them all. I own some on Toulouse street. I own one or two pieces on Canal street. I own some on Conti street, and some squares in the back part of the city down in between these two basins.

Q. This Upper protection levee was built, I believe?

A. Yes, sir; I have seen it, and talked to Mr. Bell about it.

Q. You know its location?

A. Yes, sir.

Q. Does that levee in any way protect the city of New Orleans from overflow?

A. Yes, sir.

Q. How?

A. If there should be a break in the levee above there it would protect the city and give the people time to—the embankment has been cut now and is low—but it would give the people time enough to build it up and prevent it from overflow.

Q. How has it been cut?

A. Cut by the inhabitants, by the teams going over it.

Q. When it was originally made, was there any cut in it?

A. I cannot say, but, if it was, it was so small that it could be made good.

Q. Had you been in the city when the overflow was?

A. Yes, sir; at the time of the Sauve's crevasse it came up as far as Christ church, which was at the corner of Canal and Dauphin streets. I have been told that it came as far as the St. Charles hotel, but I did not see it.

Q. That Upper protection levee would be a protection against any overflow of that description?

A. Yes, sir.

Q. It would divert the water off into the lake and then it would go over through the rigollettes?

A. Yes, sir; of course, if it was large enough. It might raise the lake but a very few inches. The Bonnet Carre crevasse only raised it a few inches.

Q. Do you know the protection levee that is built below the city of New Orleans on the People's Avenue canal?

A. I have not; I have never seen it.

Q. Do you know whether there is one there or not?

A. No, sir.

Q. Have you ever been out on the Louisville & Nashville railroad where it crosses the Northeastern road?

A. I have been on that road, but not to notice it.

Q. Do you know that they have the Northeastern road on the bank of the canal?

A. No, sir.

Q. With the completion of the revetment levee on the lake from West End down to the protection levee below the city of New Orleans and with proper drainage machines upon the lake shore and the canals cleaned out, would or would not the territory embraced within the canals and the protection levees be drained?

281 A. Most decidedly.

Q. What effect would the drainage of this territory have upon the value of the land?

A. It would appreciate the land, because the land would be useful for cultivation, so that if there was not a dollar added to the present market value of the land it would be a valuable asset, whereas now it is an incumbrance.

Q. What is the occasion of this incumbrance?

A. The lack of drainage. I am speaking now of the lands beyond the Metarie ridge and between it and the lake; then the land this side of the ridge, between Claiborne street and the ridge—every square of it has been cultivated at some time and had to be abandoned because it was overflowed. It is just dry long enough to tempt an industrious man to open a garden, and then the overflow comes and wipes him out.

Q. What is the occasion of the overflow coming?

A. The breaking of the banks of the canals. The greatest overflow that we had yet was in 1871. That was caused by somebody selling too much dirt off the land of the New canal and Hagan avenue. That alone cost the city $100,000. I paid it over the counter myself and saw every dollar of it.

Q. Has this land between the ridge and Claiborne street appreciated or depreciated in value within the last 10 years?

A. It has depreciated very much.

Q. Can you assign any cause for the depreciation?

A. Well, I presume because it is hopeless to think of getting any drainage done. Before that we were buoyed up with the hope that we would get it drained some time.

Q. Had you any connection with any applications to the city for the drainage of any of the territory in the rear of the city?

A. We have petitioned the city to have the repairs made to the draining machines, and to have new machines put there that would have made us dry.

Q. With what result?

A. We were ignored because the city had no money.

Q. That is, if a drainage machine was put there, it would have kept you dry?

A. The petition to the council reviewed the whole subject within three months. It showed that with the machinery we proposed to put at Galvez and Toulouse street it would have thrown out all the water that would have fallen between Julia and Elysian Fields streets, Gentilly road and the Metairie ridge. The largest rain ever known was 7 inches in 3 hours, and we calculated that if we got 60 per cent. of the power of the machinery we could throw it out in 6 hours. It was the machinery of the steamboat Ed. Richardson, the whole costing the insignificant sum of $85,000, but the city did not have the money to do it.

Q. How many overflows have there been there within the last 10 years?

A. I can hardly tell you. We have had about 6 within the last

year—that is, I mean you could not cross from one side of the
282 street to the other where the levee is lowest and subject to overflow. It is because it is lowest and liable to overflow that it flows off quicker.

Q. What is the condition of the drainage canal at the present time?

A. Well, the Galvez Street, the Broad Street, the Poydras Street and Hagan Avenue are pretty well filled with dirt; you would call it mud, but it is slime that accumulates from the street drainage. It is heavy enough to block up the canals, but not solid soil. The old Toulouse canal has been cleaned out, and they put the mud on the bank of the Old basin.

Q. When they are filled up does it destroy their capacity to act as reservoirs in case of overflows?

A. Yes, sir.

Q. What effect does that have upon the surrounding country?

A. Well, there being no place for the water to go, as it comes down from the city to us—banks it, and it is spread out over the land. The land has been wet so long that it has been in the condition that Bienville found it; it is covered with water; there is no space for absorption.

Q. Since June, 1876, what canals, if any, have been dug or deepened or levees built, if any?

A. I cannot call to mind any, except the enlargement and partial cleaning out of the Toulouse canal.

Q. What canals have been dug or protection levees built?

A. I do not know of any, of my own knowledge.

Q. You have spoken of this machine which you and your committee proposed. What effect would the location of that machinery and the running of that machinery, in the way that you have suggested, have upon the value of the lands that were drained in the way of prices, if it were drained?

Mr. Saunders objects to all this testimony on the ground that it is irrelevant and not connected with the case.

A. It would appreciate the value.

Q. To what extent?

A. That is hard to say, to what extent; I think it would double the value of the vacant land—those that are large enough for garden purposes. I think any square that was free from overflow would bring $100 — year, which would be 10 per cent. on $1,000.

Q. Then the value, if the land was properly drained, so that it could be occupied and used, cultivated, or whatever it may be, in your judgment, would be worth $1,000 a square?

A. Yes, sir.

Q. Now, if the land on the lake side of the Metairie ridge was properly drained dry and susceptible of cultivation, what, in your judgment, would that land be worth?

A. It would be pretty near as valuable as land used for garden purposes; it would be worth that for the hay that would come off it.

Q. How many acres are there in a square?

A. About 2½ acres.

285 Q. Well, if that land was protected and drained, it would be worth then, in your judgment, as you have stated about $1,000 a square, say $400 an acre?

A. Yes, sir; of course you have to take into consideration the nearer they are to town the more they would be worth. As you go further towards the shore they would be worth a little less, although they would produce the same kind of stuff.

Q. They would be further from the market?

A. Yes, sir.

Q. Would you estimate the square between the ridge and the lake, if they were drained and protected, at $200 an acre, more or less?

A. I think they would pay a good revenue at $200 an acre.

Q. Are you familiar with all of the land in the rear of the city?

A. Yes, sir; I have been out there a great deal.

Mr. L. J. FREMAUX, sworn on behalf of the complainant, says:

By Mr. DE GRAY:

Q. Your residence is New Orleans?

A. Yes, sir.

Q. What is your age?

A. 68 years.

Q. And your business?

A. A civil engineer.

Q. How long have you been a civil engineer?

A. About 20, 30, or 35 years. I was never anything else.

Q. Have you ever been connected with the city of New Orleans as one of the civil engineers or surveyors?

A. Yes, sir.

Q. When?

A. Under Mr. Bell; before that under Mr. Sourgie and D'Hemecourt. Now I am with Major Harrod, the present city surveyor.

Q. You say you were under Mr. Bell. When was Mr. Bell the city surveyor?

A. From 1870 to 1874.

Q. Did you or his department have any connection with the work which was performed by the Mississippi and Mexican Gulf Ship Canal Co. and Van Norden, as transferee thereof?

A. I do not recollect the name of the company and on what work they were engaged.

Q. I am directing your attention to Mr. Bell's plan in reference to the drainage of the city of New Orleans. Were you connected with the work on the lake shore?

A. I was connected with the (that) work on the lake shore.

Q. Do you know the plan in its details?

A. Yes, sir.

Q. Was it devised and extended into details while you were in the office?

A. Yes, sir.

Q. Please look at the map marked Complainant's Map
284 No. 2, O. B. S., ex., April 5th, 1888, and state whether you ever saw it before.

A. Yes, sir; I have seen it often; I have many copies in my possession.

Q. This purports to be the revetment levee on the lake-shore front?

A. Yes, sir; as it was contemplated.

Q. As it was contemplated?

A. Yes, sir.

Q. Who made this drawing or map?

A. Every member of the staff had a hand in it. I made a survey of the western part, between the New Orleans canal and the Upper protection levee. I staked out the whole levee to the lower line, but only the upper portion of the levee was built and finished—that is, between the Upper protection levee and the West End. The staking of this levee was only at far points. There was one point here and one point there.

(The rest of this page is blank.)

I staked out the whole levee for a long distance—for instance, from the New canal to the Bayou St. John. I put an iron post at the Bayou St. John, connected at the Pontchartrain railroad, and then drew a curve to the People's avenue; but the only work completed was the West End embankment.

Q. The profile of the work as contemplated is to be found in this map also where is exhibited a cross-section?

A. Yes, sir.

Q. The work, as I understand, had a protection levee and a canal on the upper line extending from the river to Carrollton, to the lake shore?

A. Yes, sir.

Q. Was that canal and the protection levee in front of Carrollton to the lake shore completed?

A. Yes, sir; we always traveled on that one coming that way.

Q. What was done on the Lower protection levee and canal—how far was that completed?

A. Only in a very rough levee, the embankment thrown up; that is all.

Q. How far did the work extend?

A. I recollect about—it started from the lake and went to Lafayette avenue, about 1,000 feet around.

Witness being shown complainant's map 1, marked O. B. S., ex., April 5th, 1888, and having his attention called to the Lower Line protection levee, says: That is a good representative of the work as done and not completed; it was rough and not completed.

Q. What is or was the condition of the work and the condition of the levees on the lake-shore front at the time of the transfer of the work to the city of New Orleans; or do you know about that?

A. No, sir; I do not.

285 Q. There were various internal canals that were to lead to the canal which was to be built behind the protection levee?

A. Yes, sir.

Q. I notice on this other map, No. 2, various designs for the machinery and pumping stations.

A. Yes, sir; that was the completement of the system of drainage of Mr. Bell, having locks on these canals, and all the draining machinery outside in the lake altogether.

Q. The water was to be thrown out?

A. Yes, sir.

Q. How were these canals to be constructed that led from the interior city down to the lake? Were they to be constructed on a level or were they to descend?

A. Well, I do not know; I was not long enough on that part of the work. I had nothing to do with that; we had 6 bodies with surveyors at that time, and each one had his part to do.

Q. Did you ever make any plan or direction on this pumping machinery?

A. No, sir; but they were made at the office, and that is one of them; the pumping machinery I did make, that is — the office now.

Q. Now, I ask your judgment as an engineer, and your familiarity with this work, if the system had been completed as it was designed, and the pumping engines put in as they were all designed, what effect would this system of drainage have had upon the lands embraced within the territory that was to be drained?

A. It would certainly have drained them, because, you see, there was an enormous pumping station there, and a great deal of basins formed by these different canals, and then the locks to prevent overflow from the lake. It would have certainly cost an immense amount of money, but it would have done perfect service; but in my private opinion with less money you can drain it quite as well by coming in a little further.

Q. Your opinion is that it could be done at an expenditure of less money by putting this levee at the Metarie ridge?

A. The Metarie ridge is a levee itself. This levee has been cut by these various canals as they pass through, and you cannot keep the water back from the lake, and but for their having to cut this natural levee here the water never would have come up to the city.

Q. The question was not which was the best plan, but the question is this, this being the plan adopted, would this plan, if it had been carried out, have been effective and drained the territory that was embraced within its limits?

A. Yes, sir; because the numerous and powerful engines here would throw out beyond at Bayou Bienvenue.

Q. How were the internal canals—were they numerous?

A. I do not see it carried out. You have it on the other map. All the canals that were made by Mr. Bell are on that map. There was no contemplation of making more canals than are on that map.

Q. But the plan contemplated the completion of this lake-shore front?

A. Yes, sir; this is the lake-shore front, and the object of
286 Mr. Bell in putting it there was because we had to have a straight front and to take the ragged edge off; there were only two feet of water in front of the levee; we took the general bearing of the thing in 2 feet of water.

Cross-examination by Mr. HALL:

Q. You say that the effect of the system if carried out would have drained the lands?

A. Yes, sir.

Q. And all of these canals were excavated as provided in this plan and provided with reservoirs to receive the water; if these pumps were numerous and powerful they would have carried out the water?

A. Yes, sir.

Q. But you say the expense of this would have been enormous?

A. Yes, sir.

Q. How much?

A. Well, I have not figured it into thousands, but it would have cost an immense amount of money, judging from the amount that has been done.

Q. What proportion of the entire work was accomplished?

A. Hardly $\frac{1}{1}$, of it on the lake-shore front.

Q. About what proportion of the entire system—the excavation of the canals, the building of the embankments, the building of the revetment—what proportion of the entire work do you suppose was completed?

A. The only thing that I see here of new work is this Upper Line levee canal.

Witness, being shown the map No. 1, says: That was made while we were there, this Orleans canal and the continuation of the London Avenue canal; I staked that out myself, and this People's Avenue canal and the Poydras canal, but the Poydras canal did not add anything, because it was Canal street, the canal that was moved there.

Q. But it was a new canal built.

A. Yes, sir.

Q. In other words, if you take into consideration this drainage system as an entire system as it was, with the embankments built, and the levees built, the excavations made, and the pumps put up, what proportion of that work do you think, as a system, had been done? I mean what proportion has been done approximately.

A. Well, the machinery—not a piece of machinery was made nor a lock made; there was only the canals and the throwing up of the dirt that is a small part of the work comparatively to what had been done. Look at the immense work of these locks and the machinery to be renewed. We could not use any other machinery; the inside machines were not strong enough; there was not a single wheel, except perhaps the London Avenue machine had a little power.

287 Q. When you take into consideration the fact that under this plan another levee had to be built along the lake front, and taking into consideration the digging and deepening of the canal; when you take into consideration the building of the locks; when you take into consideration the buying and putting into place of the machinery, do you believe anything more than $\frac{1}{10}$ of the work has been done?

A. Well, that is what I suppose—about $\frac{1}{10}$.

Q. Now, you say that the Metarie ridge is a natural levee behind the city?

A. Yes, sir.

Q. Would the back part of the city there be overflowed from the lake by reason of the water coming up by storms if that natural levee had not been cut through?

A. No, sir; that levee never failed, but it was replaced by the people themselves to keep the water from coming over the land.

Q. So that if overflows had taken place because the water backed up from the lake it was because the canals excavated were not competent to keep out the water?

A. Yes, sir.

Q. If these canals had not been dug through the ridge the overflows would not have taken place?

A. No, sir.

By Mr. DE GRAY:

Q. And if the revetment levee along the lake shore had been built?

A. It would have done what I say.

Q. And if the protection levee along the lake-shore front had been built and the locks had been put into these canals as was contemplated, it would have protected the property not only on this side of the Metarie ridge, but it would have protected the property on the other side of the Metarie ridge?

A. Yes, sir; it would have done that.

Q. Now, the building of these canals that you have spoken of through the Metarie ridge, were they built by the Mississippi and Mexican Gulf Ship Canal Co. or by the city of New Orleans or were they built by another corporation?

A. I cannot recollect how that Orleans canal has been made—what I call the New canal.

Q. What is known as the New canal, to which you have referred as being cut through the Metarie ridge, was put there many years prior to the building of this work by the city of New Orleans?

A. Yes, sir.

Q. Was it not built by the New Orleans Canal and Banking Co., as it was called?

A. I do not know; I was not here at all.

Q. Look still at the map No. 1—the blue lines; what are they?

A. The old canals widened and deepened; these are the blue canals.

288 Q. Were these canals widened and deepened under the supervision of the city of New Orleans, while this work was going on?

A. Yes, sir, many of them are inside the Metarie ridge.

Q. And as deepened, how deep were they dug, do you remember?

Q. Well, almost all our canals at that time were dug with a small dredge-boat—the deepest that I believe they dug them was 7 feet.

Q. I will refer you to the case of the Hagan Avenue canal. Do you know how deep the Hagan Avenue canal was dug?

A. I do not know anything about that, but I know it was deeper than the others—that is, those inside of the city; Hagan Avenue canal was dug deeper, because it was outside on the open ground; it was deeper than the others, but all these canals, such as the Claiborne canal and the Galvez canal, had a little boat, and could not go deeper than 7 feet.

Q. What sort of a boat dug in the Hagan Avenue canal?

A. I do not know.

Q. Now, as I understand, all the internal canals were completed that were designated?

A. Yes, sir; but they never went. I speak of those inside the ridge. Those outside of the ridge, between that and the lake—these canals were in existence; they were not deepened; they were made by Butler during the war.

Q. As I understand you, all the canals within this area are completed; what remained to be done in the way of canals and levees was the completion of the lake-shore front levee and canal?

A. Yes, sir.

Q. All the other canals were completed, with the exception of this Lower protection levee?

A. Yes, sir; there was to be a machine right there, at Bayou Bienvenue; between the Florida walk and Bayou Bienvenue the work was not done; only from Bayou Bienvenue to the river.

Q. All that work was completed, except this lake-shore front?

A. Yes, sir.

Q. That being the case, I ask you what proportion of this work, in your judgment, of the canaling and of the protection levee, remained to be completed? I do not speak of the machinery.

A. Well, the machinery is the part necessary.

Q. Yes, but that is another part, to be paid for in another way. What part of the levees and canals were completed? I do not speak about the machinery.

A. Well, there is only that part and this part.

Q. What proportion was that of the whole of this; was it a large or a small part?

A. It is comparatively a small part; it is about $\frac{1}{5}$ of it in levees and canals.

Q. That remained to be done?

A. Yes, sir.

Q. All the rest of the canal work and the levee work had been completed?

A. Yes, sir.

289 By Mr. HALL:

Q. What was the relative cost of building the protection levee as compared with the digging of the canal and throwing up the dirt on the embankment?

A. Well, it was subject to the north and west winds and it was terrible work to put that levee there; they had the most powerful drainage-boats in there; they had to throw the dirt so very far to make the whole of that section.

Q. The base of that embankment was about 160 feet?

A. Yes, sir.

Q. What was the base of the Upper protection levee?

A. About 60 or 70 feet, maybe.

Q. Now, what was the relative cost of constructing the 2,120 feet of that protection levee as compared to a like amount to the levee on the upper line?

A. Well, there it is; a book-keeper could tell you that, but I was in the field.

Q. It was a great deal more?

A. Yes, sir.

Q. Probably 4 or 5 times greater?

A. I cannot say that.

Q. In other words, this protection levee was built in the water and mud—soft, oozy mud?

A. Yes, sir.

Q. And every storm that came up from the north and west blew away what you put up?

A. Well, I cannot say, because the stuff that was taken out of the lake was very tenacious; I took the level on the top of the bank, such as it was, and after the storm I did not find any difference to speak of; it had not settled until it dried, and when once dried it stayed there.

Q. When you took into consideration the building of the revetment and that protection levee and the grading?

A. Yes, sir; it had to be raised in this way; the revetment was on heavy planks.

Q. When you take — into consideration, about how many times more expensive was it to the people—that protection levee—than it was to dig the whole length of the upper line of the canal?

A. I cannot say exactly. I cannot say in money or estimate in money, but I believe it would have cost an immense amount of money, because the work had to go on gradually, the least wind would stop it; they had to stop sometimes 4 or 10 or 15 days and then go on again.

Q. Would you say about $\frac{1}{5}$ of the lineal measure of that work remains undone—for instance, the entire front of the protection levee; then all that part of the embankment running along the Florida walk, and then coming back to the river? Is there not more than $\frac{1}{5}$ indicated by the yellow lines?

A. Yes, sir; but I take all these canals inside to be done.

290 Q. When you say that that part remaining undone was 1/10, you mean lineal measure, without regard to the extent of the work?

A. Yes, sir. These things I never saw. I do not know what the expense was. The books are in the office.

Q. So when you fix that proportion you take the lineal measurement of the canal, with regard to the size of the canal?

A. Yes, sir.

Q. And you say that if the embankment had been built to make it effective, as indicated in that line and extent, that was necessary to make it effective, and the locks had been built and the machines put up—I understand you to say that no more than 1/10 of the extent of that entire work had been done?

A. Yes, sir; about that.

Q. What relative proportion existed between the cost of the machinery and the cost of this levee and the locks?

A. Well, that is a thing I cannot say. We estimated about that each of these dredging machines would come to $25,000 each.

Q. How many were there?

A. There were 5 that we counted on the outer line. The object of Mr. Bell was not to destroy the inside drainage, of course, until everything had been secure inside.

Q. The outside drainage machines were estimated to be worth $25,000 each, as forming part of this cost of construction, and there were estimated to be 5 of them?

A. Yes, sir.

By Mr. DE GRAY:

Q. Have you any idea of how much any of this work did cost?

A. No, sir. I say I went there early every morning in our wagons and never came back to the office, and came back at night, so that sometimes we did not see the office for 15 days. We did not keep up with the expenses of the office.

Q. Then you do not know anything about the cost of the work in dollars and cents?

A. No, sir.

Q. You do not know how the cost of the building of the revetment levee that was built for half a mile on the lake would compare with the building of any of the protection levees and canals in dollars and cents?

A. No, sir; but I suppose it could be found in the city hall.

Q. Then, that being the case, you not knowing at this time the cost of this protection levee as far as built, how can you say that in your judgment that the work remaining to be finished would cost 9 times as much as the work cost which is already done?

A. I speak of it because I saw locks built somewhere else; that these locks are considerable work and cost a great deal of money. I know one lock that was estimated to be made, though fortunately it was not, on the Teche which would cost $95,000. Now, if you had to make them in every canal it would cost an immense amount of money.

291 Q. Did you ever see Mr. Bell's estimate of the entire amount of what this work ought to cost?

A. I may have seen the amount, but I do not recollect it.

Q. Was not Mr. Bell a competent man in matters of that description?

A. Yes, sir; very competent.

Q. What would you say of his judgment that he rendered as an expert after making all his calculations upon this matter; what would you say of his judgment in these matters? Would it be reliable or not reliable?

A. I think it could be relied upon.

E. C. PALMER, sworn on behalf of the complainant, says:

By Mr. DE GRAY:

Q. Where do you live?

A. I do business in the city of New Orleans.

Q. How long have you been here?

A. 25 years.

Q. Where have you spent most of your time, you being a native of Massachusetts?

A. I spend most of — time in New Orleans.

Q. Did you ever have any business relations or connections with the Mississippi and Mexican Gulf Ship Canal Co. or Warner Van Norden in the way of loaning that concern or Van Norden any money?

A. Yes, sir; to my sorrow.

Q. To what extent?

A. A good many hundreds of thousands of dollars.

Q. Do you remember the time of the transfer from Van Norden to the city of New Orleans—the transfer and sale in June, 1876?

A. I do remember it; I was a party to it; it was in June, 1876.

Q. What was the financial condition of Van Norden at that time in June, 1876; was he a capitalist or was he not?

A. A very badly broken one.

Q. Do you know whether or not he had in his possession at that time or under his control the drainage warrants that had been issued prior to that time that were unpaid?

A. I know that he had not.

Q. How do you know that fact?

A. Because I know that I had a large proportion of them, and I know the people that had the rest of them.

Q. Were they then or were they not in his possession or under his control at the time of the transfer and sale to the city of New Orleans in June, 1876—any of the drainage warrants that were then out and unpaid?

A. I do not believe there was one; there might have been some small fractions of warrants, but not a single warrant as it was originally issued.

Q. Do you know how he got rid of them?

A. Yes, sir; I do.

292 Q. How?

A. Well, he usually—to use a homely expression—eat the calf in the cow's belly. He had to have money to pay his hands weekly or semi-monthly or monthly. He could not get his warrants from the city hall until all the measurements were taken by the city surveyor and certified by the various officers in the city hall—until they were ready to issue to him his certificates or his warrants—and he was therefore obliged to borrow money on the strength of the work he was doing to pay his hands. The amount for that work which he borrowed to my knowledge was from $15,000 to $20,000 a month, and that money he would borrow from me and from other parties in the city—from a number of people that I could name—on the pledge of his work done and on the faith of his transferring to such persons as loaned him money the warrants as soon as issued.

Q. Do you know how many drainage warrants were out and unpaid at the time—the transfer from Van Norden to the city of New Orleans, in June, 1876?

A. Approximately——

Q. How many?

A. $680,000 and odd; possibly $700,000.

Q. I mean work warrants at the time of the transfer.

A. The work warrants that were extant at the time of the sale and transfer were about $380,000, as near as may be; there may be out as much as that, but I do not think more.

Q. I ask if he held at the time he made the transfer these warrants or were they under his control?

A. He did not.

Q. You spoke of his really pledging the warrants before he got them. Had these warrants that you have spoken of, the $380,000, been pledged from time to time as he received them in order to raise money to pay his hands?

A. They had, and they were usually delivered to the pledgees on the day that he got them; sometimes the order for them was delivered before he got them. The parties of whom he got the money went or sent themselves to the city hall and had the warrants delivered to them, so that they never passed into his possession except for his indorsement. It was required by law that he should indorse them, because they were payable to the order of Warner Van Norden, transferree. I think all the warrants were made payable to his order.

Q. Are you familiar with this design for draining the city of New Orleans?

A. I was.

Q. Have you ever been over it or on it?

A. Many times.

Q. Did you examine it and how?

A. Yes, sir; I did.

Q. In what way?

A. Both on foot and in a carriage, on a steamboat and on boats.

Q. Where did you go in a steamboat?

293 A. I went through the entire ramifications of the canal-work that was done from the lake into the city—into the ridge and through the ridge. I went in a steamboat over a great many miles of that work in the different canals here and there. I could not tell you how often exactly.

Q. What was the occasion of your making this examination?

A. Because I was loaning a very large amount of money on the securities of the city, issued, as I supposed, for the payment of the work done in accordance with the contracts, and as I was very largely interested I thought it my business to know something about the facts of the case, and, furthermore, because I personally held the pledge for the loan made of the entire machines with which the company worked, and I wanted to see how it was—whether it was kept up in the proper repair and was doing work such as it ought and was capable of doing.

Q. You have seen these maps, have you not, that have been exhibited here marked Complainant's No. 1 and Complainant's No. 2?

A. Yes, sir.

Q. You are familiar with the design. I will ask you if you can state from your judgment what was the comparative proportion of the canals and levees that were completed?

A. I got from Mr. Bell, with whom I had a great many interviews on the subject many times, statements——

Mr. Hall objects to the statement as hearsay.

WITNESS: I got many statements from Mr. Bell as the work progressed, before the company abandoned or sold out to the city of New Orleans—Mr. Bell informed me—I got some statement from the company itself or from its officers, but Mr. Bell informed me that the entire work, so far as the canals were concerned, might be said to be completed—that is, the interior canalling and leveeing—with the exception of a portion of the canal and levee on the lower line, from the river to the point some little distance from the Northeastern railroad, beyond which it was completed. Mr. Bell informed me that there remained only practically the remainder of the protection levee as a work for the dredge-boats, and the rest was simply the building of locks and the putting in of the machinery.

Q. What was Mr. Bell's relation or connection with this work and with The City of New Orleans, the defendant in this case?

A. Mr. Bell, as I was led to believe, was the city's chief engineer and surveyor.

Q. Do you know it or not as a fact?

A. Yes, sir; I know it as well as any individual can.

Q. Is Mr. Bell now dead?

A. He is dead, unfortunately for the city, I think. I was going on to state that, in addition to inquiring of Mr. Bell, I myself consulted monthly the several maps on which the city surveyor painted the work as it progressed, so that I might know of my own knowledge, and I also went, as I said, on steamboats and in carriages and boats

to personally inspect and see the work as the city surveyor
294 stated to me and as Van Norden stated to me and as the other officers of the Mississippi and Mexican Gulf Ship Canal Co.—was being really done.

Q. How did the statements of Mr. Bell compare with your actual observation?

A. They were perfectly truthful. I never knew him to state anything else.

Q. Look at the complainant's map No. 1. I call your attention to the notes upon the side, which is an explanation of the coloring that is found upon the map, and ask you whether that, according to your examination, truthfully represents the state of the work at the time of the transfer to the city of New Orleans.

A. So far as my eyesight can tell me, that is exactly a copy of the map furnished me at the time of the state of the work at that date. It may be slightly different in some particulars that I cannot see, but it looks—to me, as I had the map furnished me; but this is not so complete as the map furnished me, because it gave the exact number of miles of canals that were finished, and this does not.

Q. Look at the top, at the right, and see—do you not see it?

A. Yes, sir; that is in pencil, but I have a statement and map from the city hall officers.

Mr. Hall objects on the ground that if such a map exists it must be produced and this testimony is hearsay.

WITNESS: I have had such a map or maps that stated—I have seen in court myself—that there are 26 miles of interior canals finished.

Mr. Hall objects as secondary evidence, and is inadmissible.

Q. Please look at this map and state whether the work, as exhibited on this map, agrees with your recollection of what was done.

A. I know that the work, as painted on the map that I had, was done. Whether this map agrees in every particular with that map I am unable to state from mere eyesight. I have not seen it for some time, but it looks to me as a correct map.

Q. You say that you have made a personal examination of all this work?

A. I did not say all, but most of it.

Q. Now, does that map, complainant No. 1, correspond with your recollection of the work as finished?

A. It does substantially. I do not say exactly. I do not like to say that. I do not like to say that Mr. Bell's original map or the one that I had is the exact counterpart of that.

Q. Did you ever have any consultation on your investments—the loaning of money in this matter? Did you ever inform yourself as to the practicability of this plan with other engineers or other parties?

A. I did.

Q. With whom?

A. With Mr. James B. Eads, because at that time I was interested

with him in the building of the jetties, in which company I was a large stockholder and loaned a great deal of money. Besides,
295 I had such confidence in Mr. Eads as an engineer that I showed him this plan several times, as I thought his judgment would help me, because I did not want to go on loaning money. I wanted to know could this scheme be carried out by the city and how.

Q. What was the result of your consultation with Mr. Eads?

Mr. Hunt objects to this testimony as hearsay, as conversation between third persons, and in *res inter alias acta* and therefore irrelevant.

A. Captain Eads stated to me that he considered it just as easy to drain the city of New Orleans by this plan as it was to drain any sugar plantation on the coast that he knew between the gulf of Mexico and Baton Rouge; and, as I was a sugar planter at that time, it was necessary that he should describe it to me in that way.

Q. What was the result of your judgment, having been a sugar planter? How many plantations did you manage?

A. I owned three at that time, individually.

Q. Were they drained at all?

A. Yes, sir.

Q. In what way?

A. By this very method.

Q. By levees below and above and behind?

A. Yes, sir.

Q. What was the result of your draining of these plantations; was it successful?

A. Wherever they were thoroughly drained it was successful as it had been.

Q. I ask you, were they drained?

A. When I bought them they were not drained.

Q. How was it afterwards?

A. I spent a great deal, thousands of dollars, in doing similar work as here, and where we proposed to drain the lands we made them as good and productive lands as any on the property and sometimes the very best.

Q. What was your individual judgment, based upon your individual experience in similar matters, as to the practicability of this plan of Bell's about draining the entire territory embraced within the design?

Mr. Hall objects to the question and the answer on the ground that no basis has been shown to justify the witness in being examined as an engineer or hydraulic expert.

A. For the very reason that I did not consider myself a drainage or hydraulic expert I took counsel of a man whose judgment I thought was better than my own, but I have had some little experience in that line myself. I can only say in answer to the question, generally, that I never doubted before I loaned a dollar on this work, nor do I doubt now, that that is a very feasible scheme for

the draining of the city of New Orleans—that has been. It is just as easy to drain the city of New Orleans today as it was to drain with dykes the territory of Holland, which is after the same
296 plan, which was drained 40 years ago. I would take a contract today to do that work if anybody would help me. It is a very feasible plan—the only plan I know of suitable to the city of New Orleans. It is the cheapest plan that could be devised, and I think James B. Eads has agreed with me in his opinion as to it being the cheapest plan that could possibly be devised.

Cross-examination by Mr. SAUNDERS:

Q. Did he consider the entire plan?

A. He did consider every other plan for the entire drainage, but he said they were not likely to succeed. In the first place, because the city is a dead level, there being only 13 feet fall from the river to the lake, it is almost impossible to devise a plan to render it feasible to pump it out; but this is a feasible plan, and exactly the plan that was carried out 50 years ago in Holland, which is a success. I never saw nor cannot see why this plan is not carried out, for the cost is merely nominal compared to the value to come.

Q. You have spoken of the fall from the river to the lake being comparatively slight. Was there anything in the plan that was designed to increase the fall or to make the water flow more rapidly?

A. Beyond question. The fall from the river to the lake by the levels is about, in round numbers, 13 feet by actual survey. That is all the actual fall there is in the land. The plan formed by Mr. Bell was a common-sense one, inasmuch as it increased the fall from 13 to 25 feet.

Q. How?

A. By simply providing in the rear a canal which, when pumped out, would be 12 feet deep, and that gave the additional 12 feet. It was 13 feet ordinarily, but by digging this canal 12 feet it added 12 feet, the same as we do on plantations. On plantations the people dig a big canal, and when they pump out the canal they increase the depth below the level of the land.

Q. This levee along the protection levee was 12 feet deeper than the canals?

A. No, sir. This levee was made by digging the canal in the lake, by digging the earth. These red lines, for instance, were the divisions out of which the earth was dug to make the levee. By putting so many cubic feet of earth on the levee the canal was made. Now, if they threw up a levee 12 feet high they would have a canal 12 feet deep from which they have taken the earth. Besides, then, the earth was more compact, and that made a canal which at the minimum would be 12 feet below the bottom of the lake.

Q. There was a canal along the protection levee?

A. Yes, sir; that canal resulted from the building of the protection levee.

Q. How were the internal canals which were to lead into the

reservoir canals inside the revetment levee; how were they to be constructed with regard to depth?

A. They were to be constructed—all of them—so that they had an outlet which would be at the bottom of the reservoir canal.

297 Q. Immediately back of the revetment levee?

A. Yes, sir; exactly as all systems of drainage have done, commencing 12 feet below the bottom of the lake.

Q. To what extent would that increase the fall of water from the river front to the lake?

A. 12 feet.

Q. Making it in all?

A. 25 feet; instead of having the 13 feet it was to have a minimum fall of 25 feet. That would increase the natural drainage area or power, but by the additional fall, as Captain Eads used to say in regard to the work down at the mouth of the river, it increases not only the fall, but it increases the power of every foot of canal with increased depth and increased speed by the fact that every foot you increase the depth you increase the speed at which the water runs into the canal. I have seen that demonstrated on plantations. A 5-feet canal of a certain depth will carry ever so much water per minute, but a canal the levee of which is increased another foot will carry twice as much water in the same time; and the theory was that if you gave the drainage canals a different slope of as much as 10 or 12 feet in the 6 miles, which is from the city to the lake, all the canals would have drained off more than double the amount of water that they do now. It is a simple proposition. A 6-inch pipe will carry twice as much water at a certain level as it will at another certain level, because the water goes through it with double the velocity; that is the principle of building the jetties at the mouth of the river.

By Mr. HALL:

Q. Which one of these canals did you ever take your excursions in a steamboat upon? Point them out.

A. I mean a steamtug.

Q. Did you go up or down the Upper protection canal?

A. Yes, sir.

Q. Did you go up or down the Lower protection canal?

A. Yes, sir; I did.

Q. Did you go into the New canal?

A. No, sir, because that was no portion of this system.

Q. Did you go into the Orleans canal?

A. Yes, sir.

Q. Where did you go last on a steamboat?

A. I cannot say by name, but it was here three distinct —; but I did go into some interior canals. By a steamboat you could not go into all the interior canals this side of the Metarie ridge.

Q. Did you visit these in a carriage or did you visit them in a boat?

A. No, sir; it was in a carriage—the same three I visited—this interior one in a carriage.

Q. Not these lying beyond the ridge in a carriage?

A. Well, you could drive down the whole length. I went down there often.

298 Q. There was no means of driving to the minor canals outside the Metarie ridge?

A. Yes, sir. I drove down to the London Avenue canal. There was a road along there nicely level, but it was not a first-class drive, but below the protection levee was a first-class drive. The London Avenue was rough.

Q. This memorandum on the plan indicates—I mean the plan offered by the complainant—indicates there were excavated 13 miles of new canal. How many miles of canal under this plan remain to be excavated?

A. They told me about 6 miles.

Q. But these figures on the map, namely, 97,072, 66,085, 13,025, to complete the protection levee and canal, and 15,914 feet to complete the levee and canal in the Florida walk down to about —, and 9,900 feet of the protection levee and canal along the Fisherman Canal line were unfinished, or rather have not been excavated, and the sum total of these figures will show the sum total of the work that has not been done?

A. Yes, sir.

Q. Now, you state that when this transfer was made by Van Norden that he was a very needy capitalist, broken up completely?

A. He was not a capitalist at all. He was badly broken.

Q. Had he ever been a capitalist?

A. He so represented himself to me. He done very large operations and handled a great deal of money.

Q. Had he any money of his own for this work at the time he was negotiating the loans?

A. I cannot say.

Q. Why was he seeking for money?

A. Well, at the time that he was doing the work of drainage he was broken down.

Q. Did he not engineer this whole scheme by which the whole of this work was loaded upon the city?

Mr. De Gray objects.

A. My opinion is that the city herself engineered that scheme, but I do not know anything about it.

Q. He had every inducement to get rid of it?

A. On the contrary, the only way to prevent his universal bankruptcy was to keep it.

Q. Why did he sell it?

A. Because the city compelled him to sell it.

Q. How did the city compel him?

A. Because the city refused to give him any more pay for the work done.

Q. Did not the city give him the warrants?

A. Yes, sir; but they refused to give the bonds for the warrants. They put themselves on such duty that he could not work.

Q. Then, when you say that, you mean the city declined to issue the gold bonds?

A. Well, yes, sir; something; but he could not borrow the
299 money from any capitalist in the city. Mr. Godchaux and some others on Carondelet street refused to loan him any money. The securities which he was compelled by the city to take when he was trying to get bonds, he had to pledge them.

Q. Did he borrow the full value of them?

A. No, sir; not at all. If he did he would have completed the work, and the city of New Orleans would have been drained today.

Q. What was the amount of these warrants; how much were they worth?

A. When they were first issued he got as much as 75 cents on the dollar, and when capitalists lost faith in the city that she would do right they fell down to as low, before he sold out to the city, that he could not get more than 33 or 40 cents on the dollar for them. They were as low as 33⅓.

Q. When you speak of yourself as loaning money you speak of the president of the Louisiana savings bank?

A. No, sir; as an individual and having a large amount of capital to invest here for other people. The Louisiana savings bank had a very small amount comparatively, it was a small concern.

Q. The Upper protection levee is dug and is filled with water from the lake to Carrollton?

A. I cannot say its condition now, but it was said to be finished.

Q. That water in that canal on the Upper protection levee finds itself on a level? It is as high at the lake as it is at the river, as a matter of course?

A. Yes, sir.

Q. Because it is not flowing; it is absolutely stagnant water?

A. Yes, sir.

Q. Down at the lake it is perhaps a foot or two on the outside below the level of the swamp; I mean that canal. I mean the surface of the water is about a foot or two feet below the level of the swamp lands in which it passes, I mean the natural bank.

A. Yes, sir; it is about that.

Q. It is a foot or at the most two feet above the surface of the water?

A. Yes, sir.

Q. How high is the natural land at Carrollton next the river above the surface of the natural land?

A. I cannot say. I have not been there for years.

Q. At the time you saw it it was not more than 3 or 4 feet?

A. Yes, sir; very much more, but do not understand me to say that fall—it is the difference of the level between Carrollton and the lake. You think my statement of 13 feet is exaggerated, but it is not. You are quite right there. The city's front is 12 miles long The fall of the city along is an inch and a half to the mile—that is 18 inches; and then it is a fact that the bank of the river in fron

of the city is—I am informed by engineers who surveyed it—is higher. The distance from Carrollton to the lake is not half of what it is here. Of course, when the river gouges in, as it
300 does not at Carrollton, it cuts into the fall perhaps half of it.

I would say that the fall from the river to the lake there is not more than 6 feet or less. I cannot say exactly how much it is, but it is much less than here.

Q. Is the depth of this canal any deeper at Carrollton than at the lake?

A. On the contrary, it is very much less.

Q. How deep was the excavation at Carrollton?

A. I cannot say; it was over 12 feet at the lake.

Q. Now, the canal you describe as being inside the protection levee in the lake, you say the design was to excavate that 12 feet deep?

A. Yes, sir.

Q. Was it so excavated at the point where the embankment was completed?

A. Yes, sir.

Q. That was a large reservoir, in order to facilitate the drainage?

A. Yes, sir.

Q. A large canal?

A. Yes, sir; if it was completed it would have been an enormous canal.

Q. What do you estimate would have been the width of that canal?

A. I cannot say, from memory, in feet; but I could tell from the map.

Q. But it would be a canal three times larger than the Upper Line canal, or greater in receiving capacity?

A. I cannot say, but the map will show the area of the canal; the area of the canal is laid out in the tracing of the profile.

By Mr. SAUNDERS:

Q. You say you are thoroughly familiar with this scheme of drainage?

A. I do not think I said that; I said I thought I was tolerably familiar with it.

Q. You said you were interested to familiarize yourself with it?

A. Yes, sir; I was at that time.

Q. And you went over it to see if it was progressing satisfactorily?

A. Yes, sir.

Q. And to see what the proportion of the work done was to the proportion of the work to be done?

A. No, sir; that was not my object.

Q. How could you tell otherwise that the work was progressing satisfactorily?

A. I could tell by examining the maps in the first place.

Q. What was your object in examining the maps?

A. To see how rapidly the work was approaching completion.

Q. Then what you wanted to see was how the proportion of the work done compared to the proportion of the work to be done?

301 A. Yes, sir.

Q. That was to know what amount of work was to be done?

A. Yes, sir.

Q. Now, do you recollect what was the number of miles of levees that had to be excavated on the original plan?

A. No, sir; I do not.

Q. Did you ever know?

A. Yes, sir; I did know, but I cannot remember it in my mind today just what the exact number of miles was. In round numbers I have it in my mind that there were something over 30 miles of interior canalling and leveeing necessary to complete the work—something over 30 miles—of which 26 about were completed.

Q. Of the interior canals?

A. The interior canal was all completed, so far as I know, except at the Lower Line canal.

Q. Now, in inspecting this work you observed frequently the relative cost of the different parts of the work, did you not?

A. No, sir; I cannot say that I did. I did not know the cost to do that, for the reason I did not think it necessary because the measurements were all made by the officials of the city, and they would not pay for it if it was not done.

Q. Did you take notice of what work was done in the canals that were only cleaned out and those dug for the first time?

A. I do not know, but I know this work went slowly in these main canals. They were large and deep and full of stumps, and I know stumps to take a week to get out. I mean the Upper Line canal and the Lower Line canal and the Hagan Avenue and the London Avenue canal.

Q. Do you know what proportion of the new levees had been completed when the work was turned over to the city?

A. I cannot answer that question; it is all on that map.

Q. Do you know the relative cost of excavating and deepening the old canals as compared with the digging of the new canals?

A. I do not know at this distance. I did know.

Q. Was it more expensive deepening the old canals or digging the new ones?

A. Digging the new canals was very much more expensive.

Q. They were below comparison?

A. Yes, sir; they could dig a larger quantity and those that were dug through the swamps with enormous trees, and they had to cut them out.

Copy Report Adm. Improvements of Work by Miss. & Mex. Gulf Ship Canal Co., Offered by Compl't. Filed January 17, 1898.

MAYORALTY OF NEW ORLEANS,
CITY HALL, *November* 18, 1874.

(No. 2846, administration series.)

Resolved, That the report this day presented by the administrator of improvements, of work done by the Mississippi and Mex-

Adopted by the council of the city of New Orleans, November 17, 1874.

LOUIS A. WILTZ, *Mayor.*

A true copy.
DANIEL SCULLY, *Secretary.*

Regular Meeting.

CITY HALL, NEW ORLEANS,
TUESDAY, *November* 17, 1874.

The council met this day at 12 m., in regular session.

Present: Hon. Louis A. Wiltz, mayor, presiding, and administrators Brewster, Calhoun, Lewis, Schneider and Turnbull.

The minutes of the last meeting were approved.

Reports of Committee.

By Mr. Lewis, received and ordered to be spread upon the minutes:

DEPARTMENT OF IMPROVEMENTS, *November* 16, 1874.

To the city council of New Orleans:

I have the honor to submit the following report of the work done by the Mississippi and Mexican Gulf Ship Canal Company and their transferee, under act of the legislature No. 30 of 1871, up to the present date:

First drainage section.

Bayou St. John.—Excavation made along Bayou St. John from Bienville Street drainingе machine toward Orleans canal, in June and July, 1871.

Orleans canal.—Was widened and deepened up to city park, from bulkhead on Bayou St. John; Clam Shell boat commenced work in July, 1871, and being joined by boat No. 2, the canal was excavated to lake shore, joining lake water about January 25, 1873; after which the canal was widened and deepened, the last estimate being given June 1, 1874, work stopping in the vicinity of Taylor avenue.

Canal along New Orleans canal.—Excavated in January, 1872, only 150 feet from Galvez street; work stopped on account of the new saw-mill erected on the New Orleans canal.

Galvez canal.—This canal was widened and deepened between the New Orleans canal and Common street; commencing in February, 1872, and stopping April 1, 1872; afterward it was continued by small boat in September, 1872, and finished at Canal Carondelet about January 20, 1873.

Taylor Avenue (new) canal.—Connection with Orleans canal was made in March and April, 1872.

Harrison Avenue (new) canal.—Connection with Orleans canal was made in June and July, 1872.

303 Poydras Street (new) canal.—Commenced at Galvez street March 25, 1872, and finished at Carrollton avenue October 1, 1872.

Broad Street (old) canal.—Commenced in vicinity of New Orleans canal in 1872, and finished to Common street in November, 1872.

Hagan Avenue (old) canal.—Commenced in vicinity of New Orleans canal about October 20, 1872, and was finished to Bienville Street draining machine about March 15, 1873.

Carrollton Avenue (old) canal.—Commenced in vicinity of New Orleans canal about October 20, 1872, and finished at Orleans canal in July, 1873.

Toulouse Street (old) canal.—Commenced at Galvez canal about January 20, 1873, going parallel with Canal Carondelet and stopping in August, 1873, beyond Broad street.

Spanish Fort (new) canal.—Small boat commenced in July, 1874, and is not yet finished, but will be completed this month.

Excavations new canals, 28,036 lineal feet or 377,819 cubic yards; widened and deepened old canals, 23,417 lineal feet or 347,184 cubic yards; total 51,453 lineal feet or 725,003 cubic yards.

Second drainage section.

Upper Line (new) canal.—The Ridge boat commenced excavating some 150 feet south of Metairie road and west of the old Jefferson and Lake railroad, on the nineteenth of May, 1871, toward the lake, in a line nearly parallel to the old railroad. About the same time, boat No. 1 entered lake shore, cutting a channel of 1,780 feet in lake bottom and working on the same line as Ridge boat to meet the latter. The two boats met in October, 1872, and were then employed together with Clam Shell boat (the latter since August, 1872) for the widening and deepening of the canal.

Canal toward Fourteenth street.—In May, 1873, the Clam Shell boat commenced working from Metairie ridge, along Upper Line street, toward Fourteenth Street canal. This work being then continued by boat No. 1, the corner of Fourteenth street was connected about the twenty-sixth of February, 1874.

Dublin Avenue (old) canal.—Was commenced at Fourteenth street, going toward New Orleans canal and then coming back, working toward Tenth street, in which vicinity it was engaged on November 1, 1874.

Melpomene (old) tail-race.—As worked by boat J. O. Noyes, which first excavating through the shell road south of Carrollton avenue and New Orleans canal, in April, 1874, excavating the tail-race of Melpomene canal, returning to Carrollton avenue, thence to Washington shell road and entering Toledano street, and now excavating at intersection of Melpomene and Toledano streets, November 1, 1874.

Lake Shore (new) canal.—About the twentieth of September, 1872, boat No. 4 commenced work at New Orleans canal in lake bottom, excavated through levee on west side of said canal and worked toward old Jefferson and Lake railroad. In October, 1873, it was joined by Clam Shell boat, and the two boats together

304 worked until June 1, 1874, when boat No. 4 went to work on Upper Line canal; on October 1, 1874, the Clam Shell boat finished work on lake embankment, including the work for a roadway west side of New canal.

Upper Line (new) canal.—From Fourteenth street toward river, was commenced in June, 1874, and on November 1, 1874, excavated in the vicinity of Tenth street.

Excavations new canals.—20,967 lineal feet, or 581,823 cubic yards; widened and deepened old canal, 16,235 lineal feet, or 224,596 cubic yards; levees, 26,963 lineal feet, or 555,110 cubic yards.

Third draining section.

Marigny (old) canal.—Was commenced in the latter part of May, 1871, at Bayou St. John, and stopped about September 1, 1874, at Elysian Fields street.

Broad Street (old) canal.—Was commenced in March, 1872, at Marigny canal, and was finished up to about 600 feet west of St. Bernard avenue, in June, 1872.

St. Bernard Avenue (old) canal.—From Broad street the dredge-boat entered St. Bernard avenue in June, 1872, excavating a canal 1,913 lineal feet toward Claiborne street.

London Avenue (new) canal.—This canal was cut by two boats. The first one started from Marigny avenue (old canal) toward lake shore in August, 1879, stopping near London Avenue draining machine about November 1, 1872. The second boat commenced the New canal in April, 1873, at lake shore, going south, and was on November 1, about 2,800 feet from the London Avenue draining machine.

People's Avenue (new) canal.—In June, 1873, boat No. 3 entered People's avenue from lake shore, and worked on November 1, 1874, south and near Gentilly road. In June, 1874, boat No. 2 entered People's avenue.

Excavations, new canals.—17,205 lineal feet, or 279,940 cubic yards; widened and deepened, old canals, 14,910 lineal feet, or 147,416 cubic yards; levees, 9,435 lineal feet, or 155,439 cubic yards.

I respectfully invite your attention to the within sketch, presenting our system of canals and protection levees, and the position of the dredge-boats, etc., on the first day of November, 1874, and to the following summary of canal and levee work executed by the Mississippi and Mexican Gulf Ship Canal Company from the commencement to that date:

	Linear feet.	Cubic yards.
New canals excavated.....	66,208	1,239,528
Old canals widened and deepened...	54,562	719,196
Total	120,770	1,958,778
Protection levees.....	36,398	709,549
Grand total...	157,168	2,668,327

All of which is respectfully submitted.

JAMES LEWIS, *Administrator.*

305 *Testimony of A. C. Bell, Off'd by Compl't.*

Filed Jan. 17, 1898.

United States Circuit Court, Eastern District of Louisiana.

JOHN G. WARNER
vs.
THE CITY OF NEW ORLEANS.

Testimony taken in the above numbered and entitled cause on the 10th day of December, 1897, before H. J. Carter, Esq., special examiner, appointed under order of court, and reported by R. H. Carter, stenographer.

Appearances.

Wm. Grant & R. De Gray, counsel for complainant.
B. K. Miller, counsel for The City of New Orleans.
S. L. Gilmore, counsel for The City of New Orleans.

A. C. BELL, witness produced by defendant, testified as follows:

Examined by Mr. DE GRAY:

Q. What is your professsion?
A. I am a civil engineer.
Q. And what positions have you filled and occupied as such?
A. I have held positions under the United States Government as assistant engineer, I have held position as assistant engineer on railroad work and I was for a number of years assistant engineer for the Orleans levee board and also promoted as engineer of the levee board.
Q. And what is your present position?
A. City engineer for the city of New Orleans.
Q. Are you familiar with the plan of drainage that was devised by the act of legislature of 1871, and was afterwards acted upon in the years 1871, 1872, 1873, 1874 and '5 and part of 1876, by the Mississippi and Mexican Gulf Ship Canal Company and Van Norden, the transferee?
A. I can't say that I am familiar with that system of drainage.
Q. Well, let me show you this map—please look at this map which I now show you and tell me whether you have ever seen it before.

(Witness looks at map shown him by counsel.)

A. Yes, sir, I have.
Q. Does the having of that map before you, assist you in answering the question put to you?
A. This map illustrates the system of drainage as I understand that was devised by my father, W. H. Bell, who was city surveyor in 1871 up to 1874.

306 Q. He was the city surveyor at that time?

A. Yes, sir.

Q. As appears by the ordinance the various canals that were dug and deepened were provided for by the council of the city of New Orleans still I presume at the suggestion of Mr. Bell, its surveyor, and the reason I call it the plan of the city was because the city had to formerly adopt it and make it its own plan—you are familiar with that plan as shown on that map?

A. I am familiar with it, I have studied it.

Q. Wasn't this map which I now show you, prepared by yourself?

A. Yes, sir.

Q. And in whose handwriting are these memorandums which are on the margin of that map?

A. In my own.

Q. Does or does not that map show the amount of canals that were dug and the old canals that were cleaned and deepened under this scheme?

A. I can only say, Mr. De Gray, that this is a copy of a map that was prepared by W. H. Bell and which according to his memorandums, shows the amount of work done up to 1876.

Q. Do you, or not, know that the memorandums on that margin of that map, correspond exactly with the records in the city hall, of the amount of work that was done—it is all there in what is called the bill book?

A. I have never compared them.

Q. You have no doubt about its being correct?

A. I couldn't state, sir—I have no authority——

Q. Have you had occasion to observe the effect of this plan that is shown on that map as far as it was executed upon—in portions of the city of New Orleans?

A. I have.

Q. What effect or benefit has that plan had upon the portions of the city of New Orleans that it covers?

A. The only benefit that is in effect today, is in additional tail-races from the machines to the lake and the cleaning out of the interior canals and the cutting of some new canals.

Q. That is all that has been done by the city since it acquired the plan, since 1876—is that what you mean?

A. No, sir. That work was done previous to 1876.

Q. I ask you, what effect the work that is shown upon that map has had upon the drainage of the city of New Orleans, since it was finished, to the point it is finished—has it done any good?

A. It has benefited the city in this respect—that it has given, as I have stated before, tail-races from the drainage machines to the lake which the city did not possess previous to this work—it has also added some interior canals, new canals, and cleaned out the old canals.

307 Q. What effect did the digging of the new canals and the cleaning out of the old canals and the building of those tail-races, have upon the city of New Orleans—was it beneficial?

A. It benefited it temporarily, until the canals filled up.

Q. When the canals were kept clean and in operation as they should have been done—what effect did it have then?

A. That is a question I could not answer because I was young at the time and I was thinking of other matters besides drainage.

Q. I will ask you this question—whether or not you are familiar with that plan as devised by your father when he was the city engineer?

A. Yes, sir, I am familiar with it.

Q. Is it not true that the scheme that is now on, and has been adopted for the drainage of the city of New Orleans, utilizes all the exterior and outside canals and protection levees that were built by that company under that plan?

A. Yes, sir, I think that it does with the exception, probably, of the protection levee built in the lake.

Q. Well, that protection leevee—doesn't it utilize that portion of the protection levee that was built by the company in the lake—doesn't it utilize further than that, the protection levee built on the lake shore by the levee board?

A. I am under the impression that it could not utilize the protection levee built in the lake or utilize the protection levee built by the levee board on the Lake shore.

Q. This plan as far as exterior work is concerned, is an adoption of the protection levee above and below the city of New Orleans and also on the lake shore of Lake Pontchartrain?

A. Yes, sir.

Q. If that plan had been completed and those reservoirs had been kept clean and the tail-races kept open, and the various pumping stations that were designed under that plan put on the lake-shore front, and then pumping stations had also been put on the ridge to take off the surplus or drainage water or storm water—would or would not, in your judgment, that plan have drained the land?

A. It is my judgment that it would have given drainage to the city at that time. I don't think it would have been sufficient for the conditions that exist now.

Q. Wherein are the conditions different now, from what they were then?

A. Increased population, increased number of paved streets.

Q. What would have been required then, in addition to that plan, to meet the present emergency?

A. Extension of the system.

Q. That is all?

A. Yes, sir.

Q. Isn't it true that any system in your judgment, for the protection of the city of New Orleans, would require a protection levee around the exterior of it?

A. Yes, sir, that has been reported on at various times. The board of engineers I think in '68 or '69, reported on that
308 matter and advocated the building of protection levees around the city for the protection from both river and lake water.

Q. What has been the highest flood or highest water of the Mississippi river, according to the record—wasn't it this last year?

A. Yes, sir, it was last year, 1897.

Q. What use, if any, was made of the Upper protection levee during the year 1897?

A. The Upper protection levee from the river for a distance, if my memory serves me right, of 2,500 feet was raised and enlarged and was used as a protection in case of a crevasse above the city.

Q. Is it not a fact that this is a levee that is of great benefit, as matter of protection to the city of New Orleans, against overflow above?

A. The portion from the river to the ridge is.

Q. That is how far?

A. Well, there was 2,500 feet of it—I would not be positive as to the figures, it may be 2,500 or 3,500. I would not be positive—that small levee connects with the large levee built from the Upper Line canal which starts at 8th street—my memorandum gives me—it is 3,500 feet.

Q. How far is it from the river to the lake?

A. On that line?

Q. About, approximately?

A. It is probably four miles, I couldn't say, between 3½ and 4 miles.

Q. From 1876, to the present time, has the city of New Orleans had any other drainage that the drainage of this scheme, from 1876 on down to the present time? To the beginning of 1897?

A. Yes, sir, there have been other systems devised.

Q. No, I am talking about operations?

A. No, there has been no other system in operation except that.

Q. And all the drainage that the city of New Orleans has had, from 1876 down to the first day of January, 1897, was, the drainage which resulted from this plan, as far as it was completed?

A. In answering your question, you must remember that the city was composed of different drainage districts and the machines and canals were dug under the direction and from funds derived from those drainage districts, if I remember correctly, and the system that is draining the city now is a combination of those drainage districts and the only benefit that was derived, as I have stated once or twice before, was due to the cleaning out of the old canals and a small amount of new canals cut and the addition of the tail-races that were cut to the lake and that would be a very small matter of assistance in the way of drainage, because that drainage could have been pumped out into the swamp as had been done previously, and the only advantage those tail-races would be, is from a sanitary point of view, in carrying the water to the lake and allowing it to be deposited into the lake. The tail-races I can't say that they would have been very much benefit, except in that way.

Q. That would have been a good or bad thing, as a sanitary
309 measure, allowing the water to be thrown into the swamp, the drainage water?

A. It would be very bad.

Q. It could have been thrown into the swamp and whereabouts would it have been thrown into the swamp?

A. Just in the rear of the drainage machines, thrown over the ridge to the lake.

Q. Going through the swamp?

A. There were numerous small outlets to the lake through the swamp.

Q. Then, as I understand, your judgment is, that if this plan had been completed and the various pumping stations provided for on the lake front had been built and locks been put into the two commerce canals, the Old and New basin, and then if the machines had been used on the ridge to throw the rain water over the ridge into the lake, that in 1876, at that time, it would have drained the land; but owing to the increase in population and in building, etc., since that time, it would require additions to it, to meet the additional increase—is that right?

A. That is my opinion. There would have to be two lines of draining machines, one line at the lake would not have been sufficient.

Q. One line at the lake and the other at the ridge?

A. That was what was contemplated and would have successfully drained the city at that time.

Q. And as the city grew the additions would have been necessary to be put in, as the increase goes on?

A. That has to be done in any system of drainage, unless it is contemplated to put in the necessary amount, say for ten, 20 or 30 years ahead. Sometimes we look ahead and supply the necessary pumping apparatus for that length of time ahead.

Examined by Mr. MILLER:

Q. Did the first, second, third and fourth drainage districts embrace the entire area of the city?

A. No, sir; it did not.

Q. I speak of course as of date from 1871 to 1876. What proportion of the area of the city was not included in these four districts?

A. If you change that question and put it the area that was not drained, I can answer your question. I don't know the area of those different drainage sections, so therefore I can't tell you the proportion.

Q. This map that is in evidence, I believe it is indicated there?

A. I couldn't say that there was where the original drainage sections were because the way this map is, it shows the drainage sections extending into the lake—it was my impression they only extended to Gentilly and Metarie ridge; I may be in error.

Q. Are you enabled to say at all, taking the entire area of the city, how much of it was included—well, taking this map as representing the drainage districts, what part of the city, if any, would be left out of the drainage districts?

310 A. In answering Mr. Miller's question—the first question is, if it is for me to state the percentage of undrained land included in the area bounded by the levees along the Mississippi river and the rear protection levee, I will say that the area undrained would be about 40 % of the area between the river protection levee and the lake.

Q. Do you mean the Upper protection levee besides the one at the lake?

A. I do.

Q. How much of the inhabited portion of the city of New Orleans was not included within these four districts?

A. How much of the inhabited area of New Orleans was not included in these four districts?

Q. Yes.

A. There is a very small proportion to my knowledge, not included in the same.

Q. About how much, expressing it in the way that you conveniently can?

A. I could not give you a definite statement on that, Mr. Miller.

Q. You have devoted some study to the question of drainage, have you not, within the past few years?

A. Yes, sir.

Q. The subject of drainage has been very much discussed, particularly during the last ten or fifteen years, at New Orleans, has it not?

A. It has.

Q. The necessity of some improvement in that regard has been notorious, has it not?

A. Yes, sir.

Q. How many attempts have there been made to devise and put in execution, a proper system of drainage, within the last ten years?

A. That has (been) the subject of discussion from reports of different parties, during that entire time.

Q. Has is been universally conceded that the existing drainage is not at all sufficient for what was required?

A. That has been conceded, yes, sir.

Q. Was there not a system devised by some person, the execution of which was to be confided in part to an advisory board? Something that Mr. Peters was connected with, I believe, in some way or other. Was there not some effort made to establish a system some two or three years ago which for some reason or other was not carried out?

A. If you are alluding to the system of drainage that was advocated by the water and drainage committee of the city council of the past administration, why I do know of such a system?

Q. What was that?

A. That system contemplated the use of all the present canals as laid out on that map or plan, and the removal of the present machines to the lake or the construction of new machines at the lake and the abandonment of the present machines located along the ridge.

311 Q. Did that contemplate the digging of other canals besides those already in existence?

A. That I can't answer, because I did not follow it close enough.

Q. Well, that idea was abandoned, was it not?

A. It was.

Q. The system of drainage just now projected in the city of New Orleans was devised by whom?

A. It was devised by a board of consulting engineers composed of three, who were called advisory——

Q. Who were those gentlemen?

A. Mr. B. M. Harrod, Mr. Herring, I don't remember his initials, and Mr. Richardson.

Q. Who is Mr. Herring?

A. He is a very noted engineer, very thoroughly versed in the drainage of cities.

Q. Is he not regarded as the leading authority on that question, in this country?

A. He is.

Q. Does he reside here?

A. No, sir.

Q. Where does he live?

A. He lives in New York.

Q. That system provides for a very large number of additional canals in addition to those already here?

A. It does.

Q. What is a tail-race, what is it used for?

A. It is now called an out-fall canal, that is two names for it—the old name is tail-race. The out-fall canal, that is a canal which takes the water from the wheel or pump and empties *in* into the body into which it has to be thrown.

Q. Who is in charge of the carrying out of this present system—I don't mean the contractor?

A. Mr. B. M. Harrod is chief engineer of the drainage commission.

Q. Of the drainage commission, that is a body created by law?

A. Yes, sir.

Q. In the system of drainage that was in operation from 1871 to 1896 and from that period up to the present time, was there any provisions made for the separate discharge of storm water and polluted water?

A. The original intention was to carry the drainage of the city into Lake Pontchartrain.

Q. But the system as it existed, as a matter of fact was there any provision made for the separate distribution or disposal of the two kinds of water?

A. That was under consideration by my father. I have reports to the effect that he had that matter under consideration and intended to divide the city into urban and suburban drainage. The urban drainage was to go by canal down to Bayou Bienvenu into Lake Borgne, the suburban was contemplated to be carried into Lake Pontchartrain.

312 Q. Was that ever done?

A. No, sir.

Q. Does this present system provide for anything on that subject?

A. No, sir.

Q. Not for the separate discharge of storm and polluted water?

A. No, sir.

Q. It is all to be put into Lake Pontchartrain?

A. You don't mean the present system?

Q. Yes.

A. I was under the impression you were speaking of the past system. The present system contemplates carrying all polluted water or dry-weather flow, into Bayou Bienvenu, thence into Lake Borgne.

Q. If you appear to have stated here that there is no provision made for the separate distribution of storm and polluted water——

A. I want to apply that to the past system, what we call the present system, it is the present system now. Understand when I am speaking about the present system I mean what we have now at present. I don't know what system to call it by.

Q. I mean that devised by Herring and Harrod.

A. That contemplates the separation of the flow.

Q. That is now in process of being put into operation.

A. Yes, sir.

Q. In your opinion would it be necessary to provide for the separation of those two kinds of water?

A. Undoubtedly, from a sanitary point of view; we don't wish to have Lake Pontchartrain polluted.

Q. What would be the effect of it on the health of the city, to put it all into Lake Pontchartrain?

A. It would have a bad effect, I think. If you will allow me to volunteer the information, I will say it will destroy the lake front for any pleasure resort.

Q. Would that be the only effect?

A. No, it would not; I would consider now, it is injurious to the health of the population of the city.

By Mr. DE GRAY:

Q. About how long has the drainage districts of the city of New Orleans been discharging into Lake Pontchartrain—for how long a period of time?

A. As far back as I can remember, and I presume ever since it has been a city.

Q. At present it is being discharged through canals directly into the lake.

A. Yes, sir.

Q. Before that time, it was discharged over Metairie ridge into the swamp between the ridge and the lake?

—. —.

313 Q. Wasn't the system which threw it directly into the lake a better sanitary measure?

A. It was because it removed the filth further from the city.

Q. Then, the plan which is shown upon the map, which discharged the drainage into the lake directly, was an improvement on the design which contemplated throwing it into the swamp between the ridge and the lake?

A. Yes, sir.

By Mr. GRANT:

Q. Does not this present plan contemplate carrying the storm water into the lake?

A. The system of drainage devised by the drainage committee? It does; it contemplates carrying the storm water into the lake.

Q. And utilizing the tail-races and canals now in existence for that purpose?

A. Yes, sir; they are utilizing those canals, they will have to be widened and deepened.

Map of the drainage sections showing canals and amount of work done.

Note as to said map:

Already offered heretofore, at page 135 of this transcript.

To be transmitted along with this transcript of appeal, in the original, as per agreement at page 53 of this transcript.

Map of sketch of the proposed improvements on the lake-shore front:

Note as to above map:

Already offered heretofore, at page 135 of this transcript.

To be transmitted in the original, along with this transcript of appeal, as per agreement at page 53 of this transcript.

Filed Jan'y 17, 1898.

314 United States Circuit Court, Eastern District of Louisiana.

JOHN G. WARNER
vs.
CITY OF NEW ORLEANS. } No. 12332.

Testimony taken in the above entitled and numbered cause on the 24th day of December, 1897, on behalf of complainant before Henry J. Carter, Esq., special examiner, as reported by R. H. Carter, stenographer.

Appearances.

R. De Gray and Wm. Grant for complainant.
B. K. Miller and S. L. Gilmore for city of New Orleans.

P. A. RABOUIN, witness sworn on behalf of complainant, testified as follows:

Direct examination.

By Mr. DE GRAY:

Q. You were called upon by a *subpœna duces tecum*, to produce the papers in your possession relative to record No. 2447 of the superior district court. Those papers that are now here and produced—are those the papers called for?

A. Yes, sir.

Q. I also see marked up at the top of this page Copy of the petition No. 221—isn't that the number of the judgment as registered in the comptroller's office, the number of the papers pertaining to the judgment registered in the comptroller's office?

A. Mr. Font, who keeps that judgment book, can better answer that, than I.

Q. These are papers that belong to the comptroller's office of the city of New Orleans—this package that you have produced here?

A. Yes, sir. I found that in the comptroller's office when I took charge.

Q. When was that?

A. In May, 1896.

By Mr. GRANT:

Q. Do those papers properly belong to the custody of the comptroller?

A. I can't answer that exactly, only I know that I have a whole lot of them, and in my opinion they ought to belong, since judgments are registered in the comptroller's office, evidence of that judgment would be the recordation.

Q. Your office has the adjustment of taxes, has it not, claims against the city?

A. Yes, sir.

315 Cross-examination.

By Mr. MILLER:

Q. Have you any register of this suit and judgment besides the papers which you bring here?

A. Only the book which the law compels me to keep.

By Mr. DE GRAY:

Q. Do you know that the law requires that before the judgment shall be rendered that a copy of the petition and answer and the judgment, together with the certificate of the clerk of the court with the judgment as rendered, that the judgment is final and conclusive, shall be first made and presented to the comptroller before the registry takes place?

A. The law requires that the certificate shall be filed with the comptroller for recordation.

Q. Then don't you recognize this as the copy of the petition and the judgment and the certificate in these papers in that case which was the basis of the registry of the judgment in the suit of The Commissioners of the New Orleans Park against The City of New Orleans?

A. It must have been.

Q. You recognize it as such?

A. Yes, sir. Those are all the records I have.

FRED. C. FONT, witness sworn and examined on behalf of complainant, testified as follows:

Direct examination.

By Mr. DE GRAY:

Q. What is your business?

A. I am legal process clerk of the comptroller.

Q. Of Mr. Rabouin who has just been examined?

A. Yes, sir.

Q. Do you, as such clerk, have charge of the judgments that are brought to the city hall for registration?

A. Yes, sir.

Q. Are you familiar with this package of papers which has been produced here?

A. Yes, sir.

Q. Handed to me by yourself?

A. Yes, sir.

Q. It purports to be No. 221, which is the number of the registration, is it not?

A. Yes, sir.

Q. Of the judgment in the book?

A. Yes, sir.

Q. It purports to be the petition, answer, judgment, certificate of clerk and other papers in the suit entitled Commissioner- of

316 the New Orleans Park *vs.* City of New Orleans, number 2447 of the superior district court?

A. Yes, sir.
Q. Where did you find these papers?
A. Amongst the papers of record in our office.
Q. Among the papers on file and deposited in your office?
A. Yes, sir.
Q. This entire bundle that you have here produced were all put up in one package?
A. Yes, sir.

Counsel for complainant now offers from this package——
Counsel for defendants ask that the package as a whole be offered.
Counsel for complainant offers from this package the certified copy of the petition, the answer, the judgment and the certificate of the clerk of court by Joshua Corprew, deputy clerk.
Counsel for complainant also offers in evidence document marked A A, filed in said suit, May 15th, 1873. The file-mark is by George W. Flynn, deputy clerk.
Counsel for defendants objects to the offer of anything relative to this suit, except the pleadings and the judgment, on the ground that it is not identified as being part of the record already offered.
Counsel for complainant offers in evidence from said package in connection with the evidence of Fred C. Font and P. A. Rabouin, paper indorsed statement upon which the judgment for $78,178.12 is based, said statement being an account of the park commissioners in account with the city of New Orleans.
Counsel for defendant objects to the introduction of this paper first—on the ground that it is not an official document, that it is not shown to have any connection with the record of the suit offered in evidence and if such showing were made that it is incompetent as evidence to affect in any manner or to aid in the interpretation of the judgment already offered, which must be construed with reference to the pleadings in that suit alone.
Counsel for complainant also offers in evidence from said package produced by the comptroller of the city of New Orleans, certified copy of supplemental petition, order of court thereon, garnishment process propounding interrogatories to the city of New Orleans, together with the answer of the city of New Orleans thereto, and judgment based upon the answers by the city of New Orleans, together with the clerk's certificate thereto attached.

Q. Mr. Font, the judgment in this case has been duly recorded in the comptroller's office?
A. Yes, sir; and is to be found in Book 2, page 54.

Agreement.—It is agreed that the examiner shall make copies of the papers that have been offered in evidence in lieu of the originals so offered, to the end that they may be returned to the comptroller of the city of New Orleans to be restored to his records; subject to the same objections as to the originals.

No cross-examination.

317 F. N. BUTLER, witness sworn and examined on behalf of complainant, testified as follows:

Direct examination.

By Mr. DE GRAY:

Q. Mr. Butler, you reside in New Orleans?
A. Yes, sir.
Q. For how long?
A. I came here in 1865.
Q. You are a lawyer by profession, I believe?
A. Yes, sir.
Q. And have been how long?
A. I think I commenced to practice in 1868. I was admitted to the bar in 1867.
Q. Did you have a partner for many years from the time you were first admitted?
A. Yes, sir.
Q. Who was he?
A. Mr. George S. Lacy.
Q. I show you now a statement upon the back of a paper, an indorsement which is in this language "upon which the judgment for $78,178.12 is based," and ask you if you recognize the handwriting upon the back of that paper?

(Counsel hands witness paper referred to and witness examines same.)

A. I do.
Q. Whose handwriting is it in?
A. It is in the handwriting of the late Mr. George S. Lacy.
Q. This paper purports to be an account between the park commissioners and the city of New Orleans. On the foot of it *is* the judgment are these words—"Judgment June 12, '73, for $78,178.12." Now, in June, 1873, and prior thereto, who was the city attorney of the city of New Orleans?
A. I recollect that Mr. George S. Lacy was the city attorney in 1873. My recollection is that he was city attorney during the entire administration of Governor Flanders, and he retired from office when Mr. Leeds was elected mayor.
Q. That was in——
A. '74 or '75, I have forgotten which.
Q. He was then through '71, '72 and '73 and part of '74?
A. I am not sure the year in which he was elected, but he was certainly city attorney throughout the year 1873 and part of '74, and perhaps the whole of it.
Q. Please look on the credit side of this account at the words "By balance $78,178.12," and state in whose handwriting those are, on this side, you see the figures are different.

(Counsel exhibits to witness matter referred to.)

A. It seems to me very clearly that the words "By balance" and the figures "78,178.12" are in the handwriting of Mr. Lacy.

318 Counsel for complainant objects to this testimony as being first irrelevant, and if the statement which purports to be one on which the judgment of $78,000 is based, it is incompetent to show that fact and under any circumstances the judgment itself is the best evidence of its meaning and effect.

Counsel for complainant offers in evidence statement upon which the judgment for $78,178.12 is based, said statement being an account of the park commissioners in account with the city of New Orleans. Offered in connection with the testimony of Mr. F. N. Butler.

Counsel for defendant objects to the introduction of this paper first—on the ground that it is not an official document, that it is not shown to have any connection with the record of the suit offered in evidence, and if such showing were made, that it is incompetent as evidence to affect in any manner or to aid in the interpretation of the judgment already offered which must be construed with reference to the pleadings in that suit alone.

R. DE GRAY, witness sworn and — on behalf of complainant, testified as follows:

States that he has been a practicing attorney in the city of New Orleans since 1866, that he has made in the civil district court and in the superior district court, a most diligent search for the original record No. 2447, entitled Commissioners of the New Orleans Park against The City of New Orleans,—that he has been unable to find any of said papers in the late superior district court, but he has found that a transfer of a very small portion of the record of that case now appears in suit No. 7941, transferred to the civil district court on February 26th, 1883, but all that is there found is matters pertaining to that case dating from February, 1883, on, and no papers or documents relating to that case prior to that date are to be found in that case or in any other cases or in any other division of the civil district court. This is the result of labor most diligently and carefully made and examining all the records in a great many other cases where perhaps such record might have been offered in evidence, and it also has embraced an examination of a great many cases in the circuit court of the United States and among others those cases wherein this particular judgment rendered in suit No. 2447 of the superior district court for said sum of $78,178.12 was sold under execution issued in the suits Nos. 9834 and 9896 on the docket of this court, and in those cases there is no trace to be found of the original record of the superior district court,—

Counsel for complainant objects to all this as irrelevant.

and the only trace that I have been able to get at all of the proceedings in that case after all of my efforts, has been the papers which have just been produced by the comptroller of the city of New Orleans and offered in evidence, in connection with the depositions of Frank N. Butler, Mr. Rabouin and Mr. Font, the preceding witnesses.

319 *Ordinance No.* 1374, *Relating to Poydras Canal. Filed Jan'y* 17, 1898.

MAYORALTY OF NEW ORLEANS,
CITY HALL, *February* 21, 1872.

No. 1374, administration series.

An ordinance concerning a drainage canal on Poydras street from Galvez street to Carrollton avenue, and in relation to the earth excavated of this and other canals.

SECTION 1. Be it ordained by the council of the city of New Orleans, That the contemplated canal on the northeast side of the New canal as adopted in the proceedings of October, 1871, be so located that the said canal be dug out of the middle of Poydras street, commencing at Galvez street, to Carrollton avenue, the earth excavated to be thrown on the lower side of Poydras street.

SEC. 2. Be it further ordained, etc., That the earth excavated from said canal and all other drainage canals between the New canal and Canal Carondelet, be used, first to fill up Canal Street canal, and secondly in grading to a proper level the streets between said canals.

Adopted by the council of the city of New Orleans, February 20, 1872.

Yeas—Shaw, Delaisse, Remick, Lewis, Walton, Bonzano.

Nays—Cochram.

MAYORALTY OF NEW ORLEANS,
CITY HALL, *August* 4, 1875.

Ordinance 3209, administration series.

Resolved, That a drainage canal be located on Nashville avenue, to connect the Claiborne canal with the low ground or basin between St. Charles avenue and the Mississippi river, said work to be performed by the Mississippi and Mexican Gulf Ship Canal Company, and the surveyor is hereby authorized and directed to locate said canal so as to cause the least possible obstructions to the street.

Adopted by the council of the city of New Orleans, August 3, 1875.

(Signed) CHARLES J. LEEDS, *Mayor.*

DEFENDANT'S EVIDENCE.

"D. A."

Recapitulation.

Total collections from the 4 draining districts consolidated	$364,596	60
Less 10 % attorneys' fees.....	29,041	91
	335,554	69
From which deduct received for taxes in drainage warrant-	215,862	97
Leaving balance collected in cash.....	$119,691	72

320 Out of which was paid—

1st. Salaries of Mayo, Guthrie, etc., as per statement	52,006 65	
2nd. To Van Norden, transferee, as per statement	23,666 59	
3d. For old draining ac's, as per statement	44,118 29	
		119,791 53
Showing an overdraft of		99 81
Amount collected in cash from June, 1871, to July, 1876	78,748 51	
In warrants	151,174 18	
		229,922 69
Amount collected in cash from July, —, to Octo., 1888	40,943 21	
In warrants	64,668 79	
		105,632 00
Total collections as above		335,554 69

Recapitulation.

1st. Total collections from the four draining districts from June, 1871, to July, 1876 ..... 249,440 60

As follows:

	Assessments.	Interest.	10 %.
Collections, 1st d'ge dist	72,296 48	19,717 56	7,448 76
Collections, 2d d'ge dist.....	25,014 65	8,672 60	3,094 10
Collections, 3d d'ge dist.....	69,974 30	9,125 50	6,620 35
Collections, 4th d'ge dist ...	21,956 70	3,164 90	2,354 70
	189,242 13	40,680 56	19,517 91

2d. Total collections from the four draining districts from July, 1876, to Oct., 1888 ..... 115,156 00

As follows:

	Assessments.	Interest.	10 %.	*Fi. fa.'s.*
Collections, 1st d'ge dist.....	18,415 42	4,663 03	2,038 90	373 60
Collections, 2d d'ge dist.....	17,610 65	7,086 90	2,331 45	158 05
Collections, 3d d'ge dist.....	30,144 35	7,156 25	3,264 85	228 95
Collections, 4th d'ge dist.....	17,989 30	1,721 30	1,888 80	84 20
	84,159 72	20,627 48	9,524 00	844 80

321 *Collections from the Four Draining Districts Consolidated.*

	Assessments.
Assessments	273,401 85
Interest	61,308 04
10 %	29,041 91
Fi. fa.'s	844 80
Grand total	364,596 60

Statement Showing Collections from First Draining District from June, 1871, to July, 1876.

	Assessment.	Interest.	10 %.
1871.			
June collections	297.25	40.80	16.90
July collections	608.30	2.39	59.11
Aug. collections	649.20	4.30	11.15
Sept. collections	168.35	35.20	15.20
Oct. collections	348.13	36.87	17.70
Nov. collections	235.50	36.40	21.85
Dec. collections	506.10	79.10	51.95
1872.			
Jan'y collections	491.30	107.00	55.85
Feb'y collections	405.35	61.80	35.45
March collections	388.80	72.65	42.25
Apr. collections	899.10	138.60	86.75
May collections	769.40	87.40	74.35
June collections	1,299.45	130.05	79.30
July collections	1,107.60	181.45	115.60
Aug. collections	1,005.60	149.55	88.45
Sept. collections	688.40	148.50	82.15
Oct. collections	295.25	46.60	26.75
Nov. collections	479.55	12.65	6.30
Dec. collections	217.95	19.70	9.25
1873.			
Jan. collections	63.30	14.90	6.95
Feb'y collections	167.95	36.10	20.40
March collections	204.00	46.70	25.25
Apr. collections	277.85	38.75	27.05
May collections	611.65	88.75	41.45
June collections	411.15	95.55	52.75
July collections	309.10	78.20	38.70
Aug. collections	255.55	59.25	28.40
Sept. collections	184.85	55.80	22.60
Oct. collections	98.95	18.95	11.75
Nov. collections	109.10	28.75	13.55
Dec. collections	43.75	12.35	5.55
1874.			
Jan'y collections	44.15	15.05	5.95
Feb'y collections	456.35	154.75	58.60

322 *Statement Showing Collections, &c.*—Continued.

	Assessment.	Interest.	10 %.
Mar. collections	981.85	338.20	131.65
Apr. collections	1,060.30	350.75	140.85
May collections	1,215.50	404.15	162.00
June collections	1,189.45	334.99	150.45
July collections	925.20	307.50	122.95
Aug. collections	783.05	261.30	104.35
Sept. collections	1,083.60	358.55	144.00
Oct. collections	1,321.10	439.10	175.95
Nov. collections	842.95	227.45	106.05
Dec. collections	1,305.20	424.45	172.55
1875.			
Jan. collections	1,726.70	524.10	209.85
Feb'y collections	373.10	124.35	49.80
Mar. collections	833.35	277.80	111.05
Amount carried forward	27,739.63	6,507.46	3,036.76
1875.			
Am't bro't forward	27,739.63	6,507.46	3,036.76
Apr. collections	757.95	252.45	86.15
May collections	312.10	104.05	41.55
June collections	6,466.05	1,972.55	122.50
July collections	3,042.35	1,128.25	415.00
Aug. collections	5,328.95	1,998.35	724.15
Sept. collections	15,255.20	1,334.40	1,037.50
Oct. collections	3,551.00	1,667.55	523.95
Nov. collections	6,246.15	3,088.00	935.10
Dec. collections	1,923.70	952.30	287.05
1876.			
Jan. collections	249.95	120.30	37.05
Feb'y collections	65.95	31.95	9.75
Mar. collections	166.95	84.15	25.05
Apr. collections	719.85	239.20	95.70
May collections	185.80	93.45	27.95
	72,296.48	19,717.56	7,448.76

Statement of Collections from 2d Draining District from June, 1871, to July, 1876.

	Assessment.	Interest.	10 %.
1871.			
June collections	345.85	86.70	32.15
July collections	191.70	74.00	26.50
Aug. collections	771.45	70.15	84.15
Sept. collections	231.75	92.95	33.45
Oct. collections	1,322.00	113.05	43.15
Nov. collections	117.10	34.65	12.75
Dec. collections	217.80	73.35	28.60

Statement Showing Collections, &c.—Continued.

	Assessment.	Interest.	10 %.
1872.			
Jan'y collections	281.40	114.95	41.85
Feb. collections	119.50	26.45	9.35
Mar. collections	101.05	36.45	13.80
Apr. collections	123.60	47.30	17.05
May collections	880.60	272.30	117.40
June collections	83.60	18.75	7.70
July collections	328.60	27.95	11.45
Aug. collections	651.55	227.10	88.80
Sept. collections	261.80	87.20	34.85
Oct. collections	64.20	20.45	8.35
Nov. collections	64.80	22.85	8.30
Dec. collections	6.50	2.25	.85
1873.			
Jan. collections	42.80	15.80	6.10
Feb. collections	22.00	7.30	2.95
Mar. collections	37.05	12.20	4.85
Apr. collections	914.90	313.65	122.30
May collections	203.95	59.85	27.45
June collections	147.45	43.55	19.20
July collections	203.65	67.00	27.00
Aug. collections	312.05	90.30	40.45
Sept. collections	97.75	19.65	8.80
Oct. collections	45.90	15.20	6.35
Nov. collections	20.75	6.70	2.75
Dec. collections	99.30	32.05	13.10
1874.			
Jan. collections	51.55	17.00	6.80
Feb. collections	557.85	185.15	75.30
Mar. collections	521.65	170.55	68.30
Apr. collections	384.15	126.75	50.75
May collections	931.45	288.75	126.25
June collections	1,118.85	258.35	73.50
July collections	171.35	56.95	22.55
Aug. collections	224.95	75.05	29.90
Sept. collections	251.55	83.95	33.50
Oct. collections	472.80	145.90	58.05
Nov. collections	131.60	43 85	17.55
Dec. collections	244.90	82.70	32.80
1875.			
Jan. collections	151.50	50.60	20.00
Feb. collections	228.80	76.45	30.95
Mar. collections	296.90	99.05	39.65
Amount carried forward.	1,395.45	3,893.15	1,587.35

324 *Statement Showing Collections, &c.*—Continued.

	Assessment.	Interest.	10 %.
Amount bro't for'd.....	13,952.45	3,893.15	1,587.35
1875.			
Apr. collections.....	76.50	25.40	8.15
May collections.....	228.10	76.15	26.55
June collections.....	430.45	143.50	13.10
July collections.....	867.35	346.70	122.85
Aug. collections.....	2,499.35	1,008.60	320.20
Sept. collections.....	1,253.10	530.60	161.50
Oct. collections.....	739.65	419.60	118.45
Nov. collections.....	1,173.55	560.45	178.05
Dec. collections.....	1,301.20	676.05	199.60
1876.			
Jan. collections.....	341.45	125.30	41.45
Feb'y collections.....	88.15	42.30	13.05
Mar. collections.....	67.95	34.80	10.40
Apr. collections.....	642.25	304.20	94.60
May collections.....	149.20	72.25	22.50
June collections.....	1,203.95	413.55	176.30
	$25,014.65	8,672.60	3,094.10

Statement Showing Collections from 3d Draining District from May, 1872, to July, 1876.

	Assessment.	Interest.	10 %.
1872.			
May collections.....	94.15		
June collections.....	236.15		
July collections.....	426.70		
Aug. collections.....	431.35		
Sept. collections.....	546.70		
Oct. collections.....	517.15		
Nov. collections.....	68.35		
Dec. collections.....	376.00		
1873.			
Jan'y collections.....	174.50		
Feb'y collections.....	558.05		
Mar. collections.....	1,981.75	24.90	123.35
Apr. collections.....	2,316.05	44.65	202.40
May collections.....	2,910.90	57.60	290.45
June collections.....	2,051.55	55.70	204.15
July collections.....	2,146.65	62.55	214.20
Aug. collections.....	1,290.20	44.30	128.55
Sept. collections.....	611.80	39.35	60.30
Oct. collections.....	448.15	32.05	44.85
Nov. collections.....	335.10	12.30	12.35
Dec. collections.....	673.80	60.60	67.45

325 *Statement Showing Collections, &c.*—Continued.

	Assessment.	Interest.	10 %.
1874.			
Jan'y collections	113.45	11.75	13.15
Feb. collections	336.65	33.70	33.75
Mar. collections	1,937.85	192.35	194.60
Apr. collections	1,387.05	138.60	135.45
May collections	1,149.70	114.60	114 60
June collections	1,381.35	138.05	138.05
July collections	932.40	94.95	94.95
Aug. collections	827.75	82.55	82.55
Sept. collections	1,348.00	134.80	134.80
Oct. collections	686.70	68.75	68.55
Nov. collections	462.45	46.35	46.36
Dec. collections	816.70	81.65	81.60
1875.			
Jan'y collections	156.55	15.80	15.70
Feb. collections	158.95	15.35	15.85
Mar. collections	271.85	27.20	27.20
Apr. collections	839.30	84.00	83.95
May collections	1,221.45	113.35	112.70
June collections	2,054.40	231.95	122.05
July collections	1,452.85	248.40	166.25
Aug. collections	12,316.75	1,479.95	882.40
Sept. collections	4,513.20	1,060.70	555.90
Oct. collections	4,627.70	1,142.15	572.25
Nov. collections	3,910.95	940.15	482.50
Dec. collections	3,538.60	861.75	437.65
1876.			
Jan'y collections	535.55	136.70	63.95
Feb'y collections	106.95	26.40	13.25
Am't carried forward	65,298.35	7,955.95	6,038.05
1876.			
Am't bro't for'd	65,298.35	7,955.95	6,038.05
Mar. collections	427.20	108.90	52.25
Apr. collections	1,780.35	445.40	223.80
May collections	1,772.50	444.00	220.15
June collections	695.90	171.25	86.10
	69,974.30	9,125.50	6,620.35

326 *Statement Showing Collections from 4th Draining District from Jan., 1873, to July, 1876.*

	Assessment.	Interest.	10 %.
1873.			
Jan'y collections	10.40		
Feb. collections	21.70		
Mar. collections	114.00	1.65	8.35
Apr. collections	168.80	3.90	16.10
May collections	227.60	5.20	22.90
June collections	376.75	8.85	37.60
July collections	289.10	8.20	28.90
Aug. collections	251.40	6.90	25.15
Sept. collections	52.80	1.35	5.30
Oct. collections	95.25	2.75	9.50
Nov. collections	30.70	1.55	3.05
Dec. collections	57.05	1.85	5.70
1874.			
Feb'y collections	91.85	9.25	9.25
Mar. collections	106.25	10.65	10.55
Apr. collections	221.20	22.05	22.05
May collections	264.05	26.05	26.05
June collections	145.00	14.10	14.45
July collections	197.50	19.75	19.75
Aug. collections	96.80	9.75	9.75
Sept. collections	24.20	2.40	2.40
Oct. collections	65.95	6.60	6.60
1875.			
Jan'y collections	45.75	4.60	4.60
Feb. collections	27.60	2.80	2.80
Mar. collections	241.00	24.10	24.10
Apr. collections	533.95	52.60	53.15
May collections	608.40	52.75	53.85
June collections	1,293.75	129.60	75.25
July collections	1,097.10	109.00	108.90
Aug. collections	3,678.40	513 25	392.65
Sept. collections	474.40	82.90	55.10
Oct. collections	1,274.15	245.45	151.65
Nov. collections	1,069.90	124.65	111.50
Dec. collections	368.35	57.20	41.45
1876.			
Jan'y collections	216.35	42.50	25.90
Feb'y collections	69.60	11.95	8.15
Mar. collections	42.05	7.45	4.90
Apr. collections	1,690.80	322.60	203.35
May collections	4,834.15	968.20	582.00
June collections	1,482.55	250.80	172.00
	21,956.70	3,164.90	2,354.70

327 *Statement Showing Collections from 1st Draining District from July, 1876, to October, 1888.*

	Assessments.	Interest.	10 %.	*Fi. fa.'s.*
1876.				
July col.	409.35	201.60	61.25	
Aug. col.	1,180.65	572.65	177.20	89.20
Sept. col.	418.35	212.60	62.85	
Oct. col.	128.75	65.85	19.50	
Nov. col.	301.85	149.40	45.25	
Dec. col.	182.90	94.15	27.70	
1877.				
Jan. col.	41.10	21.85	6.15	
Feb. col.	8.95	3.80	1.20	
Mar. col.	139.95	72.30	21.15	
Apr. collections.	597.45	31.25	62.85	
May collections.	237.00	118.00	35.90	1.10
June collections.	299.10	125.75	42.50	
July collections.	454.50	179.80	54.85	
Aug. collections.	448.35	211.15	65.60	12.10
Sept. collections.	383.45	109.50	49.45	
Oct. collections.	479.30	235.75	71.85	4.10
Nov. collections.	1,028.80	230.25	125.60	70.50
Dec. collections.	582.05	100.95	33.80	
1878.				
Jan. collections.	1,297.65	75.70	145.15	8.70
Feb. collections.	816.55	21.15	6.35	
Mar. collections	88.15	39.25	13.25	
Apr. collections.	111.85	52.50	16.35	48.35
May collections.	224.70	112.30	33.70	
June collections.	620.05	79.35	69.90	3.50
July collections.	81.00	47.50	12.80	6.70
Aug. collections.	47.10	24.95	7.15	3.75
Sept. collections.	6.65	2.35	1.00	
Oct. collections.	21.40	10.70	3.20	3.50
Nov. collections.				
Dec. collections.	26.05	13.00	3.90	
1879.				
Jan.	269.80	5.00	27.45	
Feb.	153.50	14.60	23.10	
Mar.	58.50	31.25	9.00	3.60
Apr.	187.75	95.50	28.55	
May.	104.55	49.60	14.70	2.50
June.	2,557 30	130.75	248.65	2.50
July.	235.40	74.85	30.85	
Aug.	36.85	17.70	5.75	
Oct.	301.95	18.10	5.35	
Nov.	26.40	13.05	3.95	
Jan.	9.35	4.70	1.40	
Feb.	238.00	6.55	1.95	

328 *Statement Showing Collections, &c.*—Continued.

	Assessments.	Interest.	10 %.	Fi. fa.'s.
Mar.	24.15	13.25	3.75	3.50
Apr.	31.05	10.35	4.20	4.30
May.	49.60	31.85	8.15	8.50
June.	168.40	22.70	19.15	9.00
July.	64.65	9.45	7.40	
Am't carried for'd.	14,980.20	3,764.56	1,720.75	285.30
Am't bro't for'd...	14,980.20	3,764.56	1,720.75	285.30
1880.				
Aug.	80.25	40.30	12.25	22.70
Sept.	46.20	20.75	6.70	4.50
Oct.	62.35	31.15	9.35	
Nov.	97.90	16.60	11.30	4.50
Dec.	152.85	44.05	14.05	
1881.				
Jan'y.	84.90	18.75	9.35	
Feb.	208.40	66.95	28.75	4.50
M'ch & April.	364.02	58.08	4.95	
May	19.15	9.55	2.85	5.00
June & July.	55.45	21.30	8.60	3.50
Aug.	11.25	6.10	1.80	
Sept. & Octo.	65.80	83.05	9.90	9.00
Nov.	13.25	6.80	2.00	3.50
Dec.	5.30	2.65	.80	
1882.				
Jan'y.	26.10	13.00	3.95	
Feb. & Mar.	20.60	10.30	3.05	
Apr.	95.25	45.85	13.15	
May.	266.50	97.60	36.40	4.00
June.	18.85	10.30	2.95	
July.	10.00	5.00	1.50	
Aug. & Sept.	2.80	1.40	.40	
Octo.	30.15	9.10	4.55	4.50
Nov.	81.40	40.70	12.20	4.50
Dec.	8.50	4.25	1.30	
1883.				
Jan.	20.25	10.40	3.00	4.50
Mar.	30.90	7.95	2.50	4.50
Apr.–June.	181.75	32.15	18.75	
July–Sept.	17.45	8.85	2.55	4.60
Nov.	35.30	2.65	.80	
Dec.	16.45	3.15	1.95	
1884.				
Jan. & Feb.	31.50	....	1.15	
May & June.	39.75	3.00	1.15	
July.	18.70	9.35	.90	
Aug.	52.20	3.60	6.10	

329 *Statement Showing Collections, &c.*—Continued.

	Assessments.	Interest.	10 %.	*Fi. fa.'s.*
Sept. & Octo....	42.75	7.90	1.90	
Nov.....	5.40	2.70	.80	
1885.				
Apr.....	19.10	8.70	2.70	
May.....	52.65			
June.....	12.05	....	1.20	
July.....	74.75	5.60	8.20	
Aug.....	13.40	3.90	1.70	4.50
Sept.....	71.70	8.50	2.50	
Octo.....	25.55	5.40	1.60	
Am't carried for'd.	17,579.02	4,501.98	1,982.30	373.60
Am't bro't for'd..	17,579.02	4,501.98	1,982.30	373.60
Nov.....	6.25			
Dec.....	3.45	1.15	.45	
1886.				
Feb'y.....	289.50	38.10	16.65	
Apr.....	3.50	....	.35	
May.....	15.00			
July.....	14.15	.85	1.40	
Oct....	23.85	3.65	2.50	
Dec.....	32.00	1.00	.30	
1887.				
Jan..... ...	10.00			
Feb.....	16.90	8.65	2.50	
M'ch.....	15.25	7.65	2.30	
Apr.....	15.00	5.00	1.00	
May.....	15.15	7.60	2.25	
June.....	65.95	28.40	9.35	
Aug.....	16.65	2.85	.85	
Sept.....	5.40	3.95	1.15	
Nov....	43.70	8.00	2.00	
Dec.....	40.65	13.90	4.10	
1888.				
Feb.....	84.25	.80	1.30	
Mar.....	15.00			
May.....	6.25	3.15	.90	
June.....	38.15	15.95	4.15	
July.....	52.00	6.20	1.85	
Sept.....	8.40	4.20	1.25	
	18,415.42	4,663.03	2,038.90	373.60

330 *Statement Showing Collections from 2d Drainage District from July, 1876, to October, 1888.*

	Assessment.	Interest.	10 %.	*Fi. fa.'s.*
1876.				
July	67.55	34.90	10.30	
Aug	425.10	264.65	68.95	
Sept	442.80	193.40	62.90	
Oct	925.15	382.65	130.10	
Nov	1,062.60	499.00	156.45	
Dec	693.20	346.65	104.75	
1877.				
Jan	795.40	324.55	111.90	
Feb	1,366.15	519.00	187.75	
Mar	480.60	189.60	67.25	
Apr	62.70	31.35	9.50	
May	277.90	119.75	39.10	
June	2,193.80	568.95	161.20	
July	322.15	152.15	48.10	
Aug	877.55	392.20	128.05	
Sept	146.30	72.60	22.85	
Octo	244,55	69.00	36.80	
Nov	240.30	120.30	36.15	
Dec	93.20	25.90	10.95	
1878.				
Jan	111.30	55.60	16.65	
Feb	55.35	26.85	8.60	
Mar	85.55	41.85	9.75	
Ap'l	106.05	53.35	15.90	
May	288.50	53.50	28.45	
June	59.10	31.40	9.10	
July	221.95	100.95	32.50	
Aug	163.95	83.95	24.90	5.00
Sept	11.75	1 75	24.90	
Octo	8.00	4.60	1.25	
Nov	217.05	108.30	32.50	4.00
Dec	154.65	62.80	21.00	20.65
1879.				
Jan'y	278.60	111.90	43.15	21.70
Feb	153.55	85.15	28.20	
Mar	428.45	130.25	57.00	
Apr	20.60	10.40	3.05	
May	127.65	60.25	16.95	
June	60.65	34.10	10.05	5.00
July	139.05	70.75	21.30	
Aug	263.65	125.25	37.75	20.00
Sept	5.25	3.50	.85	
Oct	119.00	18.60	5.50	9.40
Nov				
Dec	10.30	5.30	1.55	8.55

331 *Statement Showing Collections, &c.*—Continued.

	Assessments.	Interest.	10 %.	*F. fa.'s.*
1880.				
Jan	63.20	33.65	9.70	11.00
Feb'y	64.15	34.75	9.80	
Mar	45.25	23.35	7.05	
Apr	17.00	11.30	2.80	
Am't carried for'd.	13,936.55	5,690.00	1,848.35	105.90
Am't bro't forward.	13,936 55	5,690.00	1,848.35	105.90
May	28.15	15.20	4.30	
June	31.35	12.10	4.25	
July	105.50	34.20	11.95	
Aug	8.95	4.65	1.35	
Sept	13.55	6.85	2.00	
Octo	1.00	.50	.15	
Nov	47.70	24.10	7.15	9.00
Dec	267.15	61.00	32.50	
1881.				
Jan	2.55	1.30	.45	
Feb	8.75	5.20	1.50	
Mar. & Apr	16.40	8.65	2.55	4.50
May	58.90	29.45	8.95	
June & July	45.65	22.20	7.80	
Aug	32.05	16.20	4.80	
Sept. & Oct	71.70	25.95	10.25	9.00
Dec	30.25	15.20	4.65	
1882.				
Jan	84.80	42.35	12.70	9.00
Feb. & Mar	16.10	8.25	2.55	
Apr	29.15	14.35	4.40	4.50
May to June 7	5.55	2.85	.85	
June	35.75	19.60	5.50	
July	164.00	32.90	16.70	
Aug. & Sept	376.20	43.40	38.95	
Oct	1,072.65	536.30	160.90	
Nov	17.40	9.00	2.65	4.50
Dec	26.35	13.10	3.90	4.50
1883.				
Jan. & Feb	16.00	8.00	1.00	
Mar	33.10	.70	3.55	
Apr	32.20	10.85	4.35	
June	9.65	4.95	1.50	
July	25.35	12.70	3.90	
Sept	3.20	2.20	.55	
Oct. & Nov	49.65	10.00	2.75	
Dec	3.65	1.80	.70	
1884.				
Jan. & Feb	13.15	6.65	1.95	
Mar	33.35	14.20	4.25	

332 *Statement Showing Collections, &c.*—Continued.

	Assessments.	Interest.	10 %.	*Fi. fa.'s.*
Apr	35.75	17.90	5.40	4.55
May	10.45	2.75	.90	
June	56.00	16.00	8.00	
July	323.30	89.70	27.10	
Aug	9.85	5.35	1.55	
Octo	5.70	2.85	.85	
Nov	47.80	23.85	6.15	
Dec	33.25	16.60	4.95	
1885.				
Feb	2.80	1.75	.45	
Am't carried for'd.	17,278.30	6,943.65	2,281.90	155.45
1885.				
Am't bro't for'd	17,278.30	6,943.65	2,281.90	155.45
Apr	23.85	7.75	3.00	
May	3.00	1.50	.50	
July	48.55	8.65	6.60	
Aug	9.95	3.20	1.15	
Sept	77.35	.20	.05	
Oct	2.10	1.05	.35	
Nov	5.80	2.90	1.00	
Dec	8.95	4.80	1.50	
1886.				
Feb	5 25	2.65	.80	
Apr	68.40	19.65	5.75	
May	22.80	1.40	.40	
June	5.95	2.55	.85	
Oct	4.55	2.10	.80	
Dec	9.00	4.50	1.35	
1887.				
Jan	8.25	4.10	1.25	
Feb	20.00			
Mar	6.10	3.25	.95	
Apr	10.50	1.35	.60	
May	22.40	11.00	3.40	
Aug	12.25	6.35	2.55	
Sept	20.20	12.30	3.30	2.60
Nov. & Dec	32.90	16.15	4.80	
1888.				
Feb	10.30	1.40	.30	
Mar	20.75	6.85	2.10	
May	50.65	16.50	5.90	
June	2.10	1.10	.30	
	17,610.65	7,086.90	2,331.45	158.05

333 *Statement Showing Collections from 3rd Drainage District from July, 1876, to October, 1888.*

	Assessments.	Interest.	10 %.	*Fi. fa.'s.*
1876.				
July–Aug.	2,616.00	647.50	326.20	
Sept.	618.40	154.80	77.45	
Oct.	343.60	62.70	40.50	
Nov.	387.15	98.80	48.60	
Dec.	105.25	26.80	11.65	
1877.				
Jan.	250.75	62.05	31.30	
Feb.	437.30	105.90	54.75	4.10
Mar.	608.85	157.35	76.70	
Apr.	357.60	86.05	43.35	
May.	908.35	227.90	112.10	6.00
June	401.40	99.90	48.90	
July.	697.75	140.30	59.75	
Aug.	488.35	113.15	57.25	12.30
Sept.	383.65	94.25	41.55	1.20
Oct.	354.70	75.65	38.80	
Nov.	548.60	115.65	65.50	3.60
Dec.	600.45	126.45	44.10	8.45
1878.				
Jan.	449.40	113.35	56.15	3.60
Feb.	355.55	89.45	44.55	3.50
Mar.	344.60	80.20	39.65	
Apr.	95.55	22.15	10.70	3.55
May.	225.55	56.75	28.25	3.50
June	150.90	38.90	28.15	3.60
July.	176.10	44.75	22.25	
Aug.	39.95	12.90	5.75	
Sept.	118.70	33.25	15.20	
Octo.	70.45	21.40	9.25	3.15
Nov.	123.90	31.40	15.60	
Dec.	111.50	30.25	14.15	
1879.				
Jan.	53.65	18.95	7.20	3.60
Feb.	7,685.60	1,987.70	964.90	
Mar.	871.25	217.55	108.80	12.00
Apr.	208.00	69.95	28.15	5.00
May.	2,394.80	57.45	22.35	5.00
June.	204.35	69.90	26.75	7.55
July.	45.70	16.25	6.15	
Aug.	185.95	30.80	17.20	
Sept.	608.90	140.40	74.85	4.60
Oct.	814.20	107.30	46.70	7.20
Nov.	99.50	28.60	12.25	
Dec.	59.50	20.10	8.25	

334 *Statement Showing Collections, &c.*—Continued.

	Assessments.	Interest.	10 %.	Fi. fa.'s.
1880.				
Jan.....	89.20	30.45	11.95.	11.80
Feb'y.....	232.70	74.30	34.60	7.20
Mar.....	394.50	120.15	51.75	13.70
Apr..... ...	125.95	54.20	18.00	4.50
May.....	60.40	24.70	8.55	3.60
Am't carried for'd..	26,504.45	6,036.70	2,906.50	142.30
1880.				
Am't bro't forward.	26,504.45	6,036.70	2,906.50	142.30
Jun-.....	68.85	28.95	9.65	3.60
July	134.10	39.25	16.45	
Aug.....	135.05	39.50	17.25	
Sept.....	55.20	23.60	7.85	
Oct.....	68.60	24.40	9.30	
Nov.....	48.10	14.25	5.55	
Dec....	69.95	25.45	7.60	
1881.				
Jan...	25.40	11.20	3.70	
Feb.....	38.75	14.90	5.80	
M'ch & Apr.....	48.50	9.85	3.05	
May..... ...	26.95	13.65	4.00	
June & July.....	37.80	10.05	4.55	4.50
Aug...	327.75	97.05	35.80	
Sept. & Oct.....	112.40	48.65	11.05	15.00
Nov....	47.15	22.30	6.70	
Dec.....	40.05	16.95	5.70	4.50
1882.				
Jan. & Feb.....	15.85	4.10	1.25	
Mar.....	50.70	23.60	7.50	16.45
Apr...	19.10	8.95	2.80	
May.....	16.70	8.35	2.60	
June.....	15.00	7.50	2.25	
July.....	23.95	11.20	3.50	4.50
Aug. & Sept....	35.75	13.35	4.90	
Octo.....	139.40	62.20	19.85	
Nov...	177.45	89.05	26.40	3.60
Dec.....	25.90	13.00	3.90	2.00 6.50
1883.				
Jan.....	23.20	11.50	2.75	
Feb'y.....	94.40	52.10	14.60	
Mar.....	6.00	3.00	1.00	
Apr.....	22.55	7.50	3.35	
June.....	12.60	6.35	1.90	
July..... ...	47.95	24.00	7.20	

335 *Statement Showing Collections, &c.*—Continued.

	Assessments.	Interest.	10 %.	*Fi. fa.'s.*
Sept.	15.05	7.50	2.30	
Oct. & Nov.	35.70	13.35	4.90	3.50
1884.				
Jan. & Feb.	2.55	....	.25	
Mar.	22.15	1.50	.45	
Apr.	58.70	12.65	3.75	
May.	108.90	1.10		
June	105.00	6.40	2.45	
July	55.30	26.90	7.35	4.50
Aug.	35.45	9.70	5.30	
Octo.	28.50	1.55	.65	
Nov.	6.60	3.30	1.00	
Dec.	29.10	2.05	.60	
1885.				
Feb.	71.70	26.90	9.80	
Am't carried for'd.	29,090.25	6,935.55	3,206.05	210.95
1885.				
Am't carried f'r'd.	29,090.25	6,935.55	3,206.05	210.95
Apr.	24.45	12.25	3.65	4.50
May.	26.40	10.55	3.70	
June.	32.35	13.25	4.35	
July	18.50	5.80	2.45	
Aug.	37.30	7.00	4.15	
Sept.	8.20	4.10	1.20	
Oct.	44.90	4.10	5.10	
Nov.	28.60	4.25	1.50	
Dec.	25.85	2.35	1.35	
1886.				
Feb	176.45	42.80	13.90	
Apr.	2.55	1.25	.40	
May	44.20	7.70	2.70	
June	71.80	33.65	10.50	5.00
	90.25	12.05	5.60	4.50
July	44.45	4.30	1.25	
Oct.	31.25	9.05	4.00	
Dec.	9.60	1.95	.95	
Dec.	19.50	1.95	.95	
1887.				
Jan.	33.00	4.25	.90	
Feb.	14.15	1.10		
Mar.	14.90	3.20	1.00	
Apr.	3.10	1.40		
May & Aug.	18.30	3.00	1.00	
Sept.	30.60	3.00	.90	
Dec.	28.30	11.75	2.80	

336 *Statement Showing Collections, &c.*—Continued.

	Assessments.	Interest.	10 %.	Fi. fa.'s
1888.				
Feb	30.55	.80		
Mar	15.10	7.55	2.05	4.00
May	59.90	5.10	1.55	
June	8.25	1.75	.50	
July	47.70	4.00		
Sept	13.85	4.50	1.35	
	30,144.35	7,156.25	3,264.85	228.93

Statement Showing Collection- from 4th Drainage District from July, 1876, to October, 1888.

	Assessments.	Interest.	10 %.	Fi. fa.'s
1876.				
July	10,026.90	208.65	1,095.25	
Aug	849.60	170.45	102.00	
Sept	802.05	160.15	96.30	
Oct	111.05	22.30	13.35	
Nov	46.00	8.25	5.45	
Dec	162.35	33.20	19.00	
1877.				
Jan				
Feb	76.95	15.40	9.25	
Mar	52.55	10.55	6.35	
Apr				
May	15.85	3.15	1.90	
June	27.85	6.80	3.50	
July	231.45	18.55	4.85	
Aug	9.75	5.00	1.50	3.60
Sept	65.35	16.35	8.10	
Oct	51.40	13.80	6.50	
Nov	48.75	13.65	6.10	
Dec				
1878.				
Jan	155.15	26.15	14.15	
Feb				
Mar	5.70	1.65	75	
Apr	72.00	13.10	8.25	
May	195.05	49.00	24.40	
June				
July	114.50	36.65	15.15	
Aug				
Sept	108.85	27.85	13.65	
Oct	5.75	1.95	75	
Nov	38.55	12.85	5.10	
Dec				
1879.				
Jan	182.05	46.75	22.85	

337 *Statement Showing Collections, &c.*—Continued.

	Assessments.	Interest.	10 %.	*Fi. fa.'s.*
Feb.	462.10	50.80	55.35	
Mar.	223.60	59.55	28.15	
Apr.	24.45	7.95	3.25	
May	44.40	5.50	1.90	
June	44.25	14.55	5.85	
July	265.70	87.60	34.50	26.75
Aug.	274.10	80.20	34.60	1.75
Sept.	186.00	34.55	22.05	
Oct.	416.00	11.40	4.00	
Nov.	89.00	31.05	12.00	
Dec.	57.40	18.10	6.70	
1880.				
Jan'y	5.60	2.20	80	
Feb.	23.65	8.60	3.25	3.50
Mar.	83.40	17.50	10.30	
Apr.	171.15	68.20	23.90	19.55
Am't carried for'd.	15,816.25	1,419.95	1,661.75	62.15
1880.				
Am't for'd	15,816.25	1,419.95	1,661.75	62.15
May	100.30	38.30	13.85	4.00
June	213.15	19.55	23.85	6.75
July	84.25	37.75	12.00	
Aug.	4.30	1.75	60	
Sept.				
Oct.	5.30	2.65	80	
Nov.	100.25	24.10	10.65	
Dec.	29.20	7.10	2.15	
1881.				
Jan.	431.10	....	43.10	
Feb. & Mar.	5.80	2.90	85	
Apr.	63.45	9.50	5.95	
May to Aug.	25.85	7.30	2.60	
Sept. & Oct.	13.40	6.80	2.00	
Nov.	11.40	5.70	1.70	
Dec.				
1882.				
Jan. & Feb.	14.00	7.00	2.05	
Apr.	27.00	13.30	4.00	3.50
May to June 7	597.15	....	59.70	
June	20.70	10.35	3.30	
Octo.	24.65	11.50	3.60	
1883.				
June	5.80	2.90	85	
July	35.00			
Oct. & Nov.	21.60	5.00	1.50	
Dec.	22.00	11.00	3.30	3.70

338 *Statement Showing Collections, &c.*—Continued.

	Assessments.	Interest.	10 %.	*Fi. fa.'s.*
1884.				
Mar.	8.25	4.10	1.25	
May	7.35	3.65	1.10	
June.	14.00			
Sept.	20.00			
Nov.	12.55	6.25	1.90	
1885.				
Apr.	7.55	1.45	1.00	
May	7.10	1.80	90	
June	22.90	11.45	3.75	4.10
July	4.95	....	05	
Aug.	5.35	1.10	65	
Oct.	8.20	1.00	8.80	
1886.				
Feb.	6.85	3.40	1.00	
Apr.	16.05	3.90	1.15	
July	11.65	2.20	1.15	
Dec.	43.05	13.20	5.15	
1887.				
Jan.	20.00			
Mar.	4.00	2.00	.60	
Sept.	12.25	4.50	2.00	
Nov.	20.00			
Am't carried for'd	17,924.15	1,704.40	1,882.60	84.20
1887.				
Am't bro't for'd.	17,924.15	1,704.40	1,882.60	84.20
Dec.	16.70	8.35	2.50	
1888.				
May	23.65	....	2.35	
June.	15.75	4.00		
July	9.05	4.55	1.35	
Sept.				
	17,989.30	1,721.30	1,888.80	84.20

Recapitulation.

Amount of drainage certificates received for drainage tax from Feb'y, 1874, to Oct., 1888	203,241.95
Interest on same	12,621.02
Total	215,862.97

339 *Statement Showing Drainage Certificates Received for Drainage Tax.*

1874.		
Feb'y 10, d'g cer. 356 A by C. W. 947.....	565.27	6.53
Feb'y 18, d'g cer. 355 by C. W. 1099.....	500.00	6.95
Feb'y 18, d'g cer. 356 B by C. W. 1099.....	17.60	.25
Feb'y 27, d'g cer. 383 by C. W. 1291.....	468.10	
Mar. 3, d'g cer. 388 by C. W. 1359.....	97.95	
Mar. 9, d'g cer. 371 by C. W. 1447.....	489.50	2.70
Mar. 10, d'g cer. 370 by C. W. 1467.....	500.00	2.78
Mar. 13, d'g cer. 396 by C. W. 1579...	1,000.00	.45
Mar. 26, d'g cer. 404 by C. W. 1769.... ...	354.12	3.08
Mar. 26, d'g cer. 366 A by C. W. 1769... ..	295.24	.88
Mar. 26, d'g cer. 398 by C. W. 1769.....	921.47	2.81
Mar. 31, d'g cer. 366 B by C. W. 1915.....	204.76	1.94
Mar. 31, d'g cer. 367 A by C. W. 1915... ..	298.11	3.19
Apr. 9, d'g cer. 367 B by C. W. 2011.....	201.89	2.21
1874.		
Apr. 9, d'g cer. 368 by C. W. 2011.....	500.00	5.80
Apr. 16, d'g cer. 397 by C. W. 2089.....	1,000.00	8.00
Apr. 16, d'g cer. 410 by C. W. 2089.....	352.25	.25
Apr. 21, d'g cer. 373 A by C. W. 2151.....	790.69	9.31
Apr. 28, d'g cer. 369 by C. W. 2218.....	500.00	8.55
Apr. 28, d'g cer. 373 B by C. W. 2218.....	209.31	2.79
May 9, d'g cer. 374 A by C. W. 2377.....	800.65	12.45
May 9, d'g cer. 375 by C. W. 2377	1,000.00	15.10
May 13, d'g cer. 374 B by C. W. 2416.....	199.35	3.30
May 13, d'g cer. 376 by C. W. 2416.....	1,000.00	16.65
May 28, d'g cer. 377 by C. W. 2614.....	1,000.00	19.75
May 28, d'g cer. 416 by C. W. 2614.....	128.37	.53
June 13, d'g cer. 419 by C. W. 2816.... ...	1,941.25	9.90
June 22, d'g cer. 427 by C. W. 2970.....	300.00	.95
June 22, d'g cer. 378 by C. W. 2970...	1,000.00	25.10
June 22, d'g cer. 424 by C. W. 2970.....	200.00	.60
July 7, d'g cer. 433 by C. W. 3266.....	545.74	3.06
July 22, d'g cer. 439 by C. W. 3484.....	850.00	3.20
July 23, d'g cer. 353 by C. W. 3499.....	500.00	24.35
July 30, d'g cer. 352 by C. W. 3548...	500.00	25.10
Aug. 13, d'g cer. 354 by C. W. 3634.....	500.00	26.55
Aug 13, d'g cer. 444 by C. W. 3634.....	154.99	1.05
Aug. 13, d'g cer. 447 by C. W. 3634.....	400.00	.71
Aug. 22, d'g cer. 446 B by C. W. 3680.....	41.05	.15
Aug. 22, d'g cer. 455 by C. W. 3680.....	447.62	1.38
Sept. 7, d'g cer. 380 by C. W. 3747.....	1,000.00	42.45
Sept. 12, d'g cer. 436 by C. W. 3769.....	600.00	9.46
Sept. 12, d'g cer. 438 B. by C. W. 3769.....	58.85	.95
Sept. 12, d'g cer. 462 by C. W. 3769.....	404.37	.27
Sept. 30, d'g cer. 461 by C. W. 3812.....	1,000.00	4.35
Oct. 13, d'g cer. 463 by C. W. 3873.....	1,000.00	1.10
Oct. 20, d'g cer. 464 by C. W. 3912.....	1,000.00	2.65

340	Oct. 31, d'g cer. 465 A by C. W. 4018.	953.80	5.10
	Nov. 14, d'g cer. 467 by C. W. 4071..	500.00	4.21
Nov. 14,	d'g cer. 465 B by C. W. 4071.....	46.20	.39
Nov. 20,	d'g cer. 468 by C. W. 4076.....	363.40	3.55
	Amount carried forward.....	27,755.90	332.83
	Amount brought forward.....	27,755.90	332.83
1874.			
Nov. 20,	d'g cer. 470 by C. W. 4076.....	291.25	2.70
Dec. 19,	d'g cer. 466 by C. W. 4081	500.00	5.75
Dec. 31,	d'g cer. 475 A by C. W. 4100.....	2,930.56	50.14
1875.			
Jan. 12,	d'g cer. 475 B by C. W. 189.....	148.82	2.93
Jan 15,	d'g cer. 486 by C. W. 260	1,009.50	4.72
Jan. 15,	d'g cer. 485 by C. W. 260.....	171.20	2.66
Jan. 15,	d'g cer. 479 by C. W. 260.....	1,235.00	26.07
Feb. 3,	d'g cer. 496 by C. W. 327....	872.25	7.15
Mar. 30,	d'g cer. 11 by C. W. 1049.....	2,000.00	34.56
1875.			
Apr. 3,	d'g cer. 30 by C. W. 1106.....	744.37	7.28
Apr. 27,	d'g cer. 14 by C. W. 1469.....	981.95	18.05
May 17,	d'g cer. 14 B by C. W. 1732.....	660.42	14.83
May 31,	d'g cer. 38 B by C. W. 2082..... ..	988.45	14.90
June 4,	d'g cer. 38 A by C. W. 2396...	1,011.55	18.90
June 10,	d'g cer. 27 by C. W. 2519.....	1,688.51	44.69
June 15,	d'g cer. 88 by C. W. 2588.....	1,500.00	12.35
June 19,	d'g cer. 90 by C. W. 2676.....	2,000.00	5.35
June 25,	d'g cer. 79 by C. W. 2750.....	2,000.00	41.75
June 25,	d'g cer. 78 by C. W. 2750.....	2,000.00	
June 30,	d'g cer. 91 A by C. W. 2811.... ..	1,550.35	7.90
July 17,	d'g cer. 77 by C. W. 3068.....	2,000.00	30.65
July 17,	d'g cer. 91 B by C. W. 3068.....	449.65	4.00
July 26,	d'g cer. 117 by C. W. 3131.....	2,000.00	6.65
July 28,	d'g cer. 113 by C. W. 3155.....	493.95	2.20
July 31,	d'g cer. 125 by C. W. 3246 B.....	2,000.00	9.75
Aug. 6,	d'g cer. 128 by C. W. 3316.....	1,000.00	6.05
Aug. 6,	d'g cer. 129 by C. W. 3316...	1,000.00	6.00
Aug. 6,	d'g cer. 138 by C. W. 3316.....	5,000.00	
Aug. 12,	d'g cer. 127 by C. W. 3389.....	2,000.00	15.20
Aug. 14,	d'g cer. 126 by C. W. 3395.....	2,000.00	14.90
Aug. 19,	d'g cer. 137 by C. W. 3445.....	5,000.00	15.55
Aug. 21,	d'g cer. 146 by C. W. 3496.....	2,000.00	6.90
Aug. 31,	d'g cer. 140 by C. W. 3584.....	5,000.00	30.00
Sept. 6,	d'g cer. 147 by C. W. 3634....	2,000.00	13.75
Sept. 7,	d'g cer. 148 by C. W. 3636.....	2,000.00	15.00
Sept. 18,	d'g cer. 149 by C. W. 3823.....	2,000.00	18.65
Sept. 29,	d'g cer. 151 by C. W. 3910...	10,000.00	57.77
Sept. 29,	d'g cer. 154 by C. W. 3910.....	5,000.00	28.88
Oct. 14,	d'g cer. 150 by C. W. 4070.....	2,000.00	30.20
Oct. 14,	d'g cer. 159 by C. W. 4070.....	2,000.00	17.35

341	Oct. 30, d'g cer. 153 A by C. W. 4238 A.	3,451.25	44.50
	Nov. 5, d'g cer. 187–189 by C. W. 4329.	2,500.00	3.85
Nov. 6,	d'g cer. 153 B by C. W. 4333.....	1,548.75	22.35
Nov. 16,	d'g cer. 179 by C. W. 4429.....	2,000.00	19.55
Dec. 14,	d'g cer. 166 A by C. W. 4685.....	2,639.25	35.05
Dec. 14,	d'g cer. 165 by C. W. 4685.....	5,000.00	51.75
Dec. 14,	d'g cer. 193 A by C. W. 4685.....	250.85	1.35
Dec. 14,	d'g cer. 166 B by C. W. 4685.....	2,360.75	35.65
Dec. 18,	d'g cer. 236 by C. W. 4824.....	500.00	1.75
Dec. 18,	d'g cer. 208 by C. W. 4824	1,000.00	8.45
	Amount carried forward.....	128,234.53	1,209.30
1875.			
	Amount brought forward.....	128,234.53	1,209.30
Dec. 18,	d'g cer. 167 B by C. W. N. 4824....	281.40	4.80
Dec. 30,	d'g cer. 194 by C. W. N. 4965.....	2,000.00	21.80
1876.			
Jan. 27,	d'g cer. 181 by C. W. N. 167.....	1,000.00	20.05
Mar. 12,	d'g cer. 250 B by C. W. N. 420 B...	236.95	2.80
Apr. 3,	d'g cer. 250 AA by C. W. N. 759....	506.65	9.45
Apr. 15,	d'g cer. 250 AB by C. W. N. 946 A..	1,256.40	27.10
Apr. 26,	d'g cer. 274 by C. W. N. 1032 A....	2,000.00	9.35
Apr. 26,	d'g cer. 253 by C. W. N. 1032 A ...	196.00	4.50
May 1,	d'g cer. 277 by C. W. N. 1049.....	2,000.00	9.40
May 10,	d'g cer. 286 by C. W. N. 1182.....	2,000.00	6.25
May 12,	d'g cer. 285 by C. W. N. 1237.. ..	951.75	8.05
May 22,	d'g cer. 158 by C. W. N. 1378.....	2,000.00	116.00
May 23,	d'g cer. 297 by C. W. N. 1391.....	457.55	
May 24,	d'g cer. 293 by C. W. N. 1394.....	1,000.00	6.30
May 31,	d'g cer. 294 A by C. W. N. 1429 A..	684.30	5.40
June 30,	d'g cer. 143 by C. W. N. 1723 B...	2,000.00	146.95
June 30,	d'g cer. 302 by C. W. N. 1723.....	2,000.00	12.90
Aug. 1,	d'g cer. 156 by C. W. N. 1880.....	2,000.00	148.43
Aug. 1,	d'g cer. 401 by C. W. N. 1880... ...	2,000.00	24.88
Aug. 1,	d'g cer. 400 by C. W. N. 1880.....	2,000.00	24.88
Aug. 1,	d'g cer. 217 by C. W. N. 1880.....	2,000.00	113.78
Aug. 1,	d'g cer. 204 by C. W. N. 1880.....	2,000.00	131.53
Aug. 1,	d'g cer. 188 A by C. W. N. 1880....	1,049.00	65.20
Sept. 5,	d'g cer. 31 by C. W. N. 1981... ...	2,000.00	239.55
Sept. 5,	d'g cer. 312 B by C. W. N. 1981....	53.30	1.08
Sept. 5,	d'g cer. 188 B by C. W. N. 1981....	951.00	65.72
Oct. 3,	d'g cer. 1 by C. W. N. 2106.....	2,000.00	279.07
Oct. 3,	d'g cer. 296 by C. W. N. 2106.....	232.37	8.11
Oct. 31,	d'g cer. 219 ABA by C. W. N. 2255..	200.00	14.89
Oct. 31,	d'g cer. 266 A by C. W. N. 2255....	181.25	10.85
Oct. 31,	d'g cer. 312 A by C. W. N. 2255....	731.20	29.57
Oct. 31,	d'g cer. 294 B by C. W. N. 2255....	315.70	12.44
Dec. 2,	d'g cer. 9 A by C. W. N. 2445.....	1,358.20	207.65
Dec. 30,	d'g cer. 8 A by C. W. N. 2704.....	936.80	149.70

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1877.		
Feb. 1, d'g cer. 8 BA by C. W. N. 188	821.25	137.05
Mar. 1, d'g cer. 12 A by C. W. N. 425	798.75	138.45
Mar. 1, d'g cer. 8 BB by C. W. N. 425	241.95	41.95
Mar. 1, d'g cer. 9 B by C. W. N. 425.....	641.80	111.25
Apr. 2, d'g cer. 12 BA by C. W. N. 672 B...	990.65	178.30
May 2, d'g cer. 13 B by C. W. N. 1003.....	536.90	100.35
June 1, d'g cer. 13 AA by C. W. N. 1481....	1,147.80	219.35
July 2, d'g cer. 20 by C. W. N. 1978.....	2,000.00	382.22
July 2, d'g cer. 7 A by C. W. N. 1978.....	627.65	124.13
Aug. 7, d'g cer. 7 BB by C. W. N. 2490.....	147.35	188.70
Aug. 7, d'g cer. 7 BA by C. W. N. 2490.....	922.10	30.14
Sept. 1, d'g cer. 209 AA by C. W. N. 2857...	59.20	8.55
Sept. 1, d'g cer. 110 A by C. W. N. 2857....	986.45	175.35
Sept. 1, d'g cer. 37 E by C. W. N. 2857.....	450.00	88.20
Sept. 1, d'g cer. 23 E by C. W. N. 2857.....	200.00	40.80
Oct. 1, d'g cer. 10 A by C. W. N. 3055	611.75	129.00
Amount carried forward.....	179,997.95	5,242.12
1877.		
Amount brought forward.....	179,997.95	5,242.12
Nov. 2, d'g cer. 295 A by C. W. 3374.....	882.60	107.45
Dec. 3, d'g cer. 10 B 3574.....	1,388.25	320.85
Dec. 3, d'g cer. 13 ABB 3574.....	120.45	27.90
1878.		
Jan. 2, d'g cer. 37 BA 4	132.25	29.80
Jan. 2, d'g cer. 263 4.....	500.00	76.65
Jan. 2, d'g cer. 12 BB 4....	210.60	50.20
Feb. 1, d'g cer. 85 A 261.....	1,323.40	289.05
Feb. 28, d'g cer. 209 BA 636	108.65	20.05
Feb. 28, d'g cer. 85 B 636.....	676.60	152.75
Apr. 1, d'g cer. 84 B 940.....	137.75	32.05
June 1, d'g cer. 84 AB 1888.....	549.35	134.65
July 1, d'g cer. 84 AAB 2405	369.30	92.85
Dec. 3, d'g cer. 37 FA 3380.....	171.42	49.88
1879.		
Feb. 3, 4, d'g cer. 84000 A 314.....	199.90	59.90
Mar. 3, d'g cer. 84000 B 604...	743.70	227.39
Mar. 3, d'g cer. 2 AB 604.....	820.70	281.37
Mar. 3, d'g cer. 37 DA 604.....	95.50	29.90
Mar. 3, d'g cer. 2 AB 604.....	72.95	24.10
Mar. 3, d'g cer. 3 604.....	2,000.00	661.33
Mar. 3, d'g cer. 4 604....	2,000.00	661.33
Mar. 3, d'g cer. 5 604....	2,000.00	661.33
Apr. 1, d'g cer. 200 A 875.....	798.40	269.45
May 2, d'g cer. 298 A 1144.....	154.25	36.40
June 2, d'g cer. 51 A 1415.....	1,659.30	547.20
July 2, 3, d'g cer. 114 A. 114 BA 1900.....	1,813.71	579.14
Aug. 11, 12, d'g cer. 167 BAB.....	52.40	16.20

343	Sept. 1, 2, d'g cer. 37 C.....	450.00	161.20
	Oct. 1, d'g cer. 66 BA.....	340.00	120.58
Oct. 31,	d'g cer. 7 BC, 130 BA, 37 GA, 266 B, 37 BB...	894.87	332.40
	1880.		
June 1,	d'g cer. 45 B 1066.....	66.85	27.50
Dec. 31,	d'g cer. 209 C 2401	275.00	113.10
	1881.		
Feb. 2,	d'g cer. 45 AA..... .. .	292.90	138.20
Apr. 22,	d'g cer. 297 C...	134.20	166.85
	1882.		
June 7,	d'g cer. 298 B	289.00	26.00
Nov. 10-12,	d'g cer. 36 or 76.....	1,300.00	774.50
	1886.		
Feb. 1-16,	d'g cer. 465 or 45 ABA 104.....	219.75	89.40
	Total..... .	203,241.95	12,621.02

Recapitulation.

Total amount of gold bonds issued in exchange for drainage warrants	$1,672,105.21
Total amount of drainage warrants exchanged for gold bonds, "as above," face value.....	1,501,494.39

NOTE.—The foregoing summary at the foot of, or at the beginning of, detailed account of the city of New Orleans, offered in evidence, marked Defendant A, showing the funding of drainage warrants to be copied in lieu of such account as per agreement at page 53 of this transcript.

Statement of Drainage Tax Paid to the City of New Orleans.

By J. B. Guthrie, collector, from October 30, 1888, to June 20th, 1891. See Ledger Treasurer's Office, folio- 304 & 305, "drainage tax."

	1888.	
Oct. 30,	received from J. B. Guthrie, collector.....	$70.55
Nov. 30,	received from J. B. Guthrie, collector.....	148.55
	1889.	
Jan. 12,	received from J. B. Guthrie, collector.....	98.15
March 2,	received from J. B. Guthrie, collector.....	94.00
April 20,	received from J. B. Guthrie, collector.....	74.40
May 31,	received from J. B. Guthrie, collector...	56.40
June 29,	received from J. B. Guthrie, collector.....	96.60
July 31,	received from J. B. Guthrie, collector.....	71.95
Aug. 31,	received from J. B. Guthrie, collector.....	59.15
Sept. 28,	received from J. B. Guthrie, collector.....	72.90
Oct. 31,	received from J. B. Guthrie, collector.....	50.00
Nov. 30,	received from J. B. Guthrie, collector... ...	108.90
Dec. 31,	received from J. B. Guthrie, collector.....	79.15

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1890.		
Jan. 31,	received from J. B. Guthrie, collector..	124.55
March 31,	received from J. B. Guthrie, collector.....	79.05
May 3,	received from J. B. Guthrie, collector.....	32.80
May 31,	received from J. B. Guthrie, collector.... ..	94.10
July 26,	received from J. B. Guthrie, collector.....	316.82
Aug. 30,	received from J. B. Guthrie, collector.....	101.75
Sept. 30,	received from J. B. Guthrie, collector.....	18.10
Oct. 31,	received from J. B. Guthrie, collector.... ..	134.10
Nov. 29,	received from J. B. Guthrie, collector.....	66.55
Dec. 31,	received from J. B. Guthrie, collector.... ..	49.80
1891.		
Jan. 31,	received from J. B. Guthrie, collector.... ..	68.10
Feb. 28,	received from J. B. Guthrie, collector.....	231.05
March 31,	received from J. B. Guthrie, collector.....	52.20
April 30,	received from J. B. Guthrie, collector.....	59.95
May 30,	received from J. B. Guthrie, collector.....	160.45
June 20,	received from J. B. Guthrie, collector.....	57.95
		$2,728.02

NEW ORLEANS, *Dec.* 21, 1897.

I certify the within account to be a true transcript from the records of the treasurer's office, city of New Orleans.

(Signed) JNO. W. WATSON,
Treasurer ad Interim.

Deposits by the City of New Orleans.

To special ac. "drainage district contract ac." from October 1, 1888, to June 19, 1891. See Ledger Treasurer's Office, folio- 311 and 312, and deposit book La. nat'l bank.

1888.		
Nov. 2,	deposit La. nat'l bank	$70.55
Dec. 3,	deposit La. nat'l bank	148.55
1889.		
Jan. 14,	deposit La. nat'l bank	98.15
March 2,	deposit La. nat'l bank	94.00
April 20,	deposit La. nat'l bank	74.40
June 1,	deposit La. nat'l bank	56.40
July 1,	deposit La. nat'l bank	96.60
July 31,	deposit La. nat'l bank	71.95
Sept. 2,	deposit La. nat'l bank	59.15
Sept. 30,	deposit La. nat'l bank	72.90
Nov. 1,	deposit La. nat'l bank	50.00
Dec. 2,	deposit La. nat'l bank	108.90
1890.		
Jan. 2,	deposit La. nat'l bank	79.15
Feb. 1,	deposit La. nat'l bank	124.55

	March 31, deposit La. nat'l bank	79.05
345	May 1, deposit La. nat'l bank	32.80
	May 31, deposit La. nat'l bank	94.10
July	—, deposit La. nat'l bank	316.82
Sept.	1, deposit La. nat'l bank	101.75
Oct.	1, deposit La. nat'l bank	18.10
Oct.	31, deposit La. nat'l bank	134.10
Dec.	1, deposit La. nat'l bank	66.55
Dec.	31, deposit La. nat'l bank	49.80
1891.		
Jan.	21, deposit La. nat'l bank	68.10
Feb.	26, deposit La. nat'l bank	231.05
April	1, deposit La. nat'l bank	52.20
May	1, deposit La. nat'l bank	59.95
June	3, deposit La. nat'l bank	160.45
June	19, deposit La. nat'l bank	57.95
		$2,728.02

NEW ORLEANS, *Dec.* 21, 1897.

I certify the within account to be a true transcript from the records of the treasurer's office, city of New Orleans.

(Signed) JNO. W. WATSON,
Treasurer ad Interim.

346 *Disbursements "Drainage District Contr. Ac." from October 1, 1888, to June 20, 1891, as per Check Book, said Ac., and Cancelled Checks in Treasurer's Office, City Hall.*

1888.					
Nov. 2.	Warrant No. 1447	J. B. Guthrie, coll'r, salary on ac. May			$35.30
2.	Warrant No. 1446	L. Laroque, b'k-keeper, salary on ac. Sept., 1888			35.25
Dec. 1.	Warrant No. 1583	L. Laroque, b'k-keeper, salary on ac. Sept., 1888			74.25
		balc. May, 1882		$39.30	
1.	Warrant No. 1582	J. B. Guthrie, coll'r, salary on ac. June, 1882	35		74.30
		balc. Sept., 1888	23		
1889.					
Jan. 12.	Warrant No. 60	L. Laroque, b'k-keeper, salary on ac. Oct., '88		25.25	49.05
12.	Warrant No. 59	J. B. Guthrie, coll'r, salary on ac. June, 1882			49.10
M'ch 1.	Warrant No. 307	J. B. Guthrie, coll'r, salary on ac. June, 1882			47.00
1.	Warrant No. 308	L. Laroque, b'k-k'p'r, salary on ac. Oct., 1888			47.00
Ap'l 18.	Warrant No. 664	J. B. Guthrie, coll'r, salary on ac. June, 1882			37.20
18.	Warrant No. 665	L. Laroque, b'k-k'p'r, salary on ac. Oct., 1888			37.20
June 1.	Warrant No. 1021	J. B. Guthrie, coll'r, salary on ac. June, 1882			28.20
1.	Warrant No. 1022	L. Laroque, b'k-k'p'r, salary on ac. Oct., 1888			28.20
July 1.	Warrant No. 1272	J. B. Guthrie, coll'r, salary on ac. June, 1882			48.30
1.	Warrant	L. Laroque, b'k-k'p'r, salary on ac. Oct., 1888			48.30
		balc. Oct., 1888		$1.05	
31.	Warrant No. 1421	L. Laroque, b'k-k'p'r, salary on ac. Nov., '88		34.95	35.95
1889.					
July 31.	Warrant No. 1420	J. B. Guthrie, coll'r, salary on ac. June, 1882			36.00
		balc. June, 1882		$19.20	
Sept. 2.	Warrant No. 1676	J. B. Guthrie, coll'r, salary on ac. July, 1882		10.40	29.60
2.	Warrant No. 1675	L. Laroque, b'k-k'p'r, salary on ac. Nov., 1888			29.55
30.	Warrant No. 1855	J. B. Guthrie, coll'r, salary on ac. July, 1882			36.45
30.	Warrant No. 1856	L. Laroque, b'k-k'p'r, salary on ac. Nov., 1888			36.45
Nov. 1.	Warrant No. 2035	J. B. Guthrie, coll'r, salary on ac. July, 1882			25.00
1.	Warrant No. 2036	L. Laroque, b'k-k'p'r, salary on ac. Nov., 1888			25.00
30.	Warrant No. 2288	L. Laroque, b'k-k'p'r, salary on ac. Nov., 1888			54.45
30.	Warrant No. 2287	J. B. Guthrie, coll'r, salary on ac. July, 1882			54.45
1890.					
Jan. 2.	Warrant No. 2474	J. B. Guthrie, coll'r, salary on ac. July, 1882			39.55
		balc. Nov., 1888		$6.70	
2.	Warrant No. 2475	L. Laroque, b'k-k'p'r, salary on ac. Dec., 1888		32.90	39.60

Feb.	1.	Warrant No. 141	J. B. Guthrie, coll'r, salary on ac. July, 1882		62.25
	1.	Warrant No. 142	L. Laroque, b'k-k'p'r, salary on ac. Dec., 1888		62.30
Ap'l	1.	Warrant No. 646	J. B. Guthrie, coll'r, salary on ac. July, 1882		39.55
	1.	Warrant No. 647	L. Laroque, b'k-k'p'r, salary on ac. Dec., 1888		39.50
May	1.	Warrant No. 862	L. Laroque, b'k-k'p'r, salary on ac. Dec., 1888		16.40
		Am't carried forw'd			$1,300.70

1890.

		Am't brought forw'd			$1,300.70
May	1.	Warrant No. 861	J. B. Guthrie, coll'r, salary ac. July, 1882		16.40
			balc. July, 1882	$16	
	31.	Warrant No. 306	J. B. Guthrie, coll'r, salary ac. Aug., 1882	31.05	47.05
	31.	Warrant No. 1102	L. Laroque, b'k-k'p'r, salary ac. Dec., 1888		47.05
July	22.	Warrant No. 1455	J. B. Guthrie, coll'r, salary ac. Aug., 1882		158.40
	22.	Warrant No. 1456	L. Laroque, b'k-k'p'r, salary ac. Dec., 1888		158.42
Sept.	1.	Warrant No. 1833	J. B. Guthrie, coll'r, salary ac. Aug., 1882		50.90
			balc. Dec., 1888	$35.08	
	1.	Warrant No. 1834	L. Laroque, b'k-k'p'r, salary ac. Jan'y, 1889	15.77	50.85
	1.	Warrant No. 1879	L. Laroque, b'k-k'p'r, salary ac. Jan'y, 1889		18.10
Oct.	1.	Warrant No. 2194	L. Laroque, b'k-k'p'r, salary ac. Jan'y, 1889		74.55
	31.	Warrant No. 2153	J. B. Guthrie, coll'r, salary bal. Aug., 1882		59.55
	31.	Warrant No. 2154	J. B. Guthrie, coll'r, salary ac. Sept., 1882		45.20
Nov.	29.	Warrant No. 2397	L. Laroque, b'k-k'p'r, salary ac. Jan., 1889		21.35
	29.	Warrant No. 2396	J. B. Guthrie, coll'r, salary ac. Sept		20.75
Dec.	30.	Warrant No. 2586	L. Laroque, b'k-k'p'r, salary ac. Jan'y, 1889		33.50
	30.	Warrant No. 2587	J. B. Guthrie, coll'r, salary ac. Sept		26.75

1891.

Jan.	31.	Warrant No. 219	bal. Jan., '89	$36.73	
			L. Laroque, b'k-k'p'r, salary ac. Feb., 1889	.17	36.90
	31.	Warrant No. 220	J. B. Guthrie, coll'r, salary ac. Sept		148.90
Feb.	23.	Warrant No. 370	L. Laroque, b'k-k'p'r, salary ac. Feb., 1889		82.15
	23.	Warrant No. 371	J. B. Guthrie, coll'r		26.10
Ap'l	1.	Check No. 323	L. Laroque, b'k-k'p'r		26.10
	1.	Check No. 324	J. B. Guthrie, coll'r		30.00
	30.	Check No. 325	L. Laroque, b'k-k'p'r		29.95
	30.	Check No. 326			

May 30.	Check No. 327	J. B. Guthrie, coll'r	80.25
30.	Check No. 328	L. Laroque, b'k-k'p'r	80.20
June 15.	Check No. 329	L. Laroque, b'k-k'p'r	34.45
15.	Check No. 330	J. B. Guthrie, coll'r	23.50
			$2,728.02

NEW ORLEANS, *December* 21, 1897.

I hereby certify the foregoing statement to be a true transcript from the records on file in the office of the city treasurer of New Orleans.

(Signed) JNO. W. WATSON,
Treasurer ad Interim.

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MAYORALTY OF NEW ORLEANS,
CITY HALL, 20*th April*, 1883.

(No. 264, council series.)

Resolved, That a committee of five be appointed to investigate and report whether or not drainage taxes are being now enacted and collected from parties selling real estate in the city of New Orleans and against which property said drainage taxes have been recorded in the mortgage office; by what authority said drainage taxes are being collected heretofore; how much has been collected, and what became of the amount so collected; also whether or not it has been decided by the supreme court of the State that said drainage taxes are illegal.

Adopted by the council of the city of New Orleans 17th of April, 1883.

M. McNAMARA,
Clerk of Council.

Approved 20th April, 1883.

W. J. BEHAN, *Mayor.*

A true copy:

C. L. WALKER,
Secretary of Council.

Report of Committee on Drainage.

Extract of printed proceedings of council.

Report by special committee on drainage tax.

NEW ORLEANS, *May* 15, 1883.

To the hon. the mayor and council of the city of New Orleans:

Your special committee appointed to investigate the status of the drainage tax beg leave to report as follows:

The drainage tax is entirely imposed by acts of the legislature, the history and particular provisions of which it is wholly unnecessary to review in detail. These acts sought to introduce and carry out a scheme of drainage and reclaiming of lands in and about the parish of Orleans. To pay the cost of drainage a certain ad valorem tax per superficial square foot was imposed on all property under certain formalities, and its registry in the mortgage office operated a privilege on the property until the tax is paid.

Under act No. 30, acts of 1871, a private corporation, the Mississippi and Mexican Gulf Ship Canal Company was charged with the work, and "drainage warrants" were issued in payment for the work done under the act, payable out of any money in the treasury to the credit of the said company, which declaration is equivalent to saying payable out of drainage tax.

In 1876 the city, under authority of an act of the legisla-
350 ture, took charge of the works of the Mississippi and Mexican Gulf Ship Canal Company, and one Warner Van Norden — act before G. Le Gardeur, notary, dated June 7, 1876. The sale was made for the sum and consideration of $300,000, payable in drainage warrants. By this transfer the rights of all holders of drainage warrants were recognized, and, consistently with the idea that these drainage warrants could only be paid out of the drainage tax, a bureau of collection in charge of a collector was agreed to, who was authorized in the name of the city, for the benefit of the warrant-holders, as an agent of the parties, to collect and, under charge and control of the financial affairs of the city, account for and disburse the drainage tax collected.

In this manner a large amount of drainage tax has been collected. A large amount is outstanding, but it is mainly on property actualy worth less than the amount — tax itself, as the tax is two mills per superficial foot. It is easily understood that on large tracts in the rear of the city the total tax exceeds the cash value of the property.

It is estimated by those who have had charge of the collections that of the amount outstanding, all other conditions permitting, the sum of one hundred and twenty thousand dollars could be collected. The officer appointed under the contract referred to informs the committee that since 1881 the collections have not been sufficient to defray the expenses of the collection bureau as organized under the contract.

There is not now and there has not been for some time any forced collections of this tax by the city. None of her officers or attorneys other than those mentioned in the contract of June 7th, 1876, collected or attempted to collect drainage tax.

It appears that some drainage tax is continually paid into the city in connection with transfer of real estate. Whenever a piece of property is about to change hands the drainage tax, unless previously paid, appears on the mortgage certificate as a registered lien. As the tax is on superficial area, it is frequently on available improved property of insignificant amount, and, as the purchaser insists on a clear title, the tax is paid, as it may cost less to obtain an order of court to cancel it.

If there were no claims (drainage warrants) outstanding against the unpaid tax the subject could be easily disposed of. Your committee would cheerfully recommend an ordinance remitting or declaring null the tax and directing the recorder of mortgages to cancel as draining-tax inscriptions.

A great portion of the tax still recorded can, we are informed, easily be annulled on the application of parties in interest under the principles laid down by the supreme court of the State in two important decisions growing out of this legislation. It has been decided that the judgment for drainage tax in the fourth drainage district is null and void, but this is only to the form of the proceeding. The question of the liability of the property is still open. The more important principle was decided, in what is known as the

Davidson case, that a drainage tax could not be collected on
351 property without proof that the property was benefited by the drainage. Of this the greater portion of the unpaid, if not the whole, might be cancelled but for the complications arising out of the outstanding warrants. There are over $600,000 such out; $600,000. More or less are held by or owned by Crossly & Sons, of London, who are trying by every possible and legal means to enforce payment. Two suits are pending against the city in the United States circuit court, brought by the Crossleys on a mandamus to compel the levy of a special tax to pay a judgment against the city for drainage tax. We are informed that the suit cannot possibly be lost to the city.

The other is on the drainage warrants themselves for about $600,000 and $100,000 damages against the city on the allegation that the city is impeding collection, to the detriment of the holders of the drainage warrants. We are also informed by high legal authority that there is absolutely no danger of any judgment on the drainage warrants against the city, except as payable out of drainage tax.

But if the city by an act of her own would prevent the collection of the tax or annul it to the injury of warrant-holders, it is clear that some liability might arise against the city; at the least to the extent to which the tax might otherwise have been collected. In such an event those who have paid drainage tax would suffer again with or for those who have not paid. All things considered, your committee is of the opinion that no action can or should be taken by the council in regard to this matter.

The city as a corporation is but a stakeholder, a trustee of the drainage tax for the benefit of the holders of drainage warrants. She is in no manner responsible for this condition of affairs; it is all brought about directly by the acts of the legislature, and it is doubtful whether she has the power to do anything in the matter, nor would the trial of the Crossly cases and decisions favorable to the city change the situation. The decision would be to declare the warrants payable out of drainage tax.

This would leave open the possible liability of the city in case she by her own acts prevented the collection.

For these reasons your committee repeats that they are of the opinion that the whole subject should for the present be let to exhaust itself and work out its own solution; beside, the most and worst is done and beyond remedy. The great bulk of the tax is paid. Those who still owe it are now, after the subject has been fully agitated and acted upon by the supreme court of the State on important points, *were* informed that they may escape the tax by a resort to the courts, and there is no other way to avoid it even under the Davidson decision. The question of fact must be determined whether the particular land was benefited by the drainage. When the fact was shown that it was not the court will order the cancellation of the inscribed tax. No other power is competent to pass judgment and no one would be precluded by any action of the city council.

352 We, therefore, after thorough and careful examination of this question, have been forced to these conclusions.

Respectfully submitted.

O. THOMAN, *Chairman.*
T. H. RYAN.
H. L. FRANTZ.
W. J. McGEEHAN.
WM. GRANER.

ORDINANCES 1504, 1507, 1563.

MAYORALTY OF NEW ORLEANS,
CITY HALL, *May* 8, 1872.

(No. 1504, administration series.)

An Ordinance to Carry into Effect the City Funding Bill and Provide for the Issue of Bonds of the New Consolidated Debt.

SECTION 1. Be it ordained by the council of the city of New Orleans, That the mayor and administrator of finance cause to be engraved and prepared for signature and issue bonds of the new consolidated debt of New Orleans, as authorized by act of the legislature of Louisiana No. 73, approved April 26, 1872.

SEC. 2. Be it further ordained, etc., That bonds issued for excavations and levees required by act No. 30 of 1871 or by the drainage laws previously enacted shall be of the denomination of $1,000 and shall be marked "drainage series," and all funds received from drainage assessments and not required for the payment of drainage warrants shall be devoted to the purchase of bonds of the drainage series, according to law.

SEC. 3. Be it further ordained, etc., That the bonds shall be signed by the mayor and administrator of finance and delivered by the latter upon the warrant of the administrator of public accounts. The administrator of finance shall make report to the administrator of public accounts of the bonds issued, with a statement of the coupons that may have been detached from the bonds delivered upon the aforesaid warrants, which coupons shall be cancelled and stamped "not issued" and posted in their proper places in the books kept for that purpose in the department of public accounts.

Adopted by the council of the city of New Orleans May 7, 1872.

Yeas—Cockrem, Shaw, Lewis, Walton, Bonzano.

BENJ. F. FLANDERS, *Mayor.*

A true copy:

H. CONQUEST CLARKE, *Secretary.*

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MAYORALTY OF NEW ORLEANS,
CITY HALL, *May* 9, 1872.

(No. 1507, administration series.)

An Ordinance Providing for the Settlement of the Mexican Gulf Warrants.

Be it ordained by the council of the city of New Orleans, That the mayor and administrator of finance be authorized to settle for all drainage warrants outstanding in bonds of the new consolidated debt, drainage series, according to section thirteen of the city funding act, at the rate for said bonds of ninety cents on the dollar, and to issue certificates redeemable in the same.

Adopted by the council of the city of New Orleans April 30, 1872.

Yeas—Cockrem, Shaw, Lewis, Walton, Bonzano.

BENJ. F. FLANDERS, *Mayor.*

A true copy:
H. CONQUEST CLARKE, *Secretary.*

MAYORALTY OF NEW ORLEANS,
CITY HALL, *June* 11, 1872.

(No. 1563, administration series.)

An Ordinance Relative to Drainage Warrants and Debts.

Be it ordained by the council of the city of New Orleans, That the mayor and administrator of finance be authorized to issue new consolidated bonds, drainage series, at rates for said bonds at not less than ninety cents on the dollar for all warrants and claims approved by ordinance of the city or referred to the mayor and administrator of finance and found correct by them and authorized by act No. 30 of 1871 to be paid out of drainage assets.

Adopted by the council of the city of New Orleans June 11, 1872.

Yeas—Cockrem, Shaw, Delassize, Remick, Lewis, Walton, Bonzano.

BENJ. F. FLANDERS, *Mayor.*

A true copy:
H. CONQUEST CLARKE, *Secretary.*

Ordinance No. 1554.

MAYORALTY OF NEW ORLEANS,
CITY HALL, *May* 30, 1872.

(No. 1554, administration series.)

An ordinance amending ordinance No. 814, administration series, relative to settlements with Mississippi and Mexican Gulf Ship Canal Company.

SECTION 1. Be it ordained by the council of the city of New Orleans. That the paragraph numbered four, under section

354 three of ordinance No. 814, administration series, be amended so as to read as follows:

4. The city will issue warrants for the payment of the work, as required by the act of the legislature, and in case of the non-realization or non-collection of assets provided for therein, the same to bear eight per cent. per annum interest, the said warrants to be issued with the understanding, to be inscribed therein or indorsed thereon, that they shall not be enforceable by suit and judgment, but if not paid within one year out of the proceeds of the drainage tax and assets they shall be fundable in new consolidated bonds of the city drainage series, according to the terms of section thirteen of act No. 73 of 1872, at the price of ninety cents on the dollar for said bonds. If not paid within one year from date, the holder may, on thirty days' notice, demand bonds at ninety cents as aforesaid, and the city, in like manner, in case there be not funds on hand at or before said time to take up in its regular order among warrants outstanding, will have the right, on thirty days' public notice, to call it in and fund it as aforesaid.

SEC. 2. Be it further ordained, etc., That the warrants issued shall be in substance as follows:

DEPARTMENT OF PUBLIC ACCOUNTS,
NEW ORLEANS, —— —, 187-.

To the administrator of finance, city of New Orleans:

Pay to the order of the Mississippi and Mexican Gulf Ship Canal Company — dollars out of any funds in the city treasury to the credit of said company.

This warrant in case of the non-realization or non-collection of assets provided under act No. 30, legislature of Louisiana, session of 1871, to bear eight per cent. per annum interest, and it is given and received with the understanding that it shall not be enforceable by suit and judgment; but if not paid within one year out of the proceeds of the drainage tax and assets it shall be fundable in new consolidated bonds of the city of the drainage series, bearing seven per cent. per annum interest, payable semi-annually, having fifty years to run, principal and interest payable in gold according to the terms and provisions of act No. 73 of 1872, approved April 26, 1872. The city, if there be not on hand within twelve months cash to pay this warrant in its regular turn among the warrants outstanding, may fund the same at the rate for said bonds of ninety cents on the dollar, and if not voluntarily presented may, on thirty days' public notice, giving the number or series of numbers in which it is embraced, recall and discontinue interest upon the same, and any holder of a fundable warrant may demand new consolidated bonds at said price.

—— ——
Administrator of Public Accounts.

SEC. 3. Be it further ordained, etc., That until further orders of the council the mayor and administrator of finance may, at the de-

sire of holders, effect the exchange of warrants now or here-
355 after issued without awaiting the expiration of a year from issue, and may issue certificates of bonds of the drainage series in the manner prescribed by ordinance No. 1507, administration series.

Adopted by the council of the city of New Orleans May 29, 1872.
Yeas—Cockrem, Shaw, Delassize, Remick, Lewis, Walton, Bonzano.

BENJ. F. FLANDERS, *Mayor.*

A true copy.
H. CONQUEST CLARKE, *Secretary.*

MAYORALTY OF NEW ORLEANS,
CITY HALL, *Dec'b'r* 5, '88.

A true copy of ordinance No. 1554, administration series, adopted by the council of the city of New Orleans May 29, 1872, approved by the mayor and duly promulgated in the official journal.

(Signed) E. L. BOWER,
[L. S.] *Chief Clerk & Custodian of City Ordinances.*

Statement of Writs of Fi. Fa. Issued and Sales Made and Proceeds Received by Aubertin, Deputy Sheriff.

Number of writs of *fieri facias* received by civil sheriff from July 13th, 1875, to March 3d, 1879, as per drainage-tax docket, 1571:

Number of writs satisfied in full, as per report book	613	
No. of writs satisfied on ac	9	
No. of writs not satisfied	949	
		1,571
No. of writs for which city of New Orleans paid to civil sheriff for costs due him on said writs		330
No. of sales advertised as per drainage-tax sales book		269
No. of sales advertised and settled without sale	72	
No. of sales to *bona fide* purchasers	8	
No. of sales to Wm. Bogart Bowers	8	
No. of sales to S. D. Moody for ac. of Warren J. Delano	32	
No. of sales to George C. Norcross	1	
No. of sales to Wm. Van Norden, for ac. of Warren J. Delano	4	
No. of sales to M. S. Cox, for ac. of Warren J. Delano	8	
No. of sales to Chas. Harvey, for ac. of Warren J. Delano	1	
No. of sales stayed and not offered	135	
		269

The sales were as follows:

To *bona fide* purchasers, 8 advertised sales, 10 adjudications.

To Wm. Bogart Bowers, 8 advertised sales, 9 adjudications.

To S. D. Moody, for ac. of Warren J. Delano, 32 advertised sales, 33 adjudications.

To George C. Norcross, for —, 1 advertised sale, 1 adjudication.

To Wm. Van Norden, for ac. of Warren J. Delano, 4 advertised sales, 4 adjudications.

356 To M. S. Cox, for ac. of Warren J. Delano, 8 advertised sales, 11 adjudications.

To Chas. Harvey, for ac. of Warren J. Delano, 1 advertised sale, 1 adjudication.

Amount of judicial costs paid by the city of New Orleans to civil sheriff on 330 writs, as per drainage-tax docket		$950.50
Amount collected by civil sheriff and paid over to drainage department (includes tax interest, attorney's commission, and $116.50 clerk's fees)		32,466.69
And realized as follows:		
Amount paid by *bona fide* purchasers at sales.	$2,079.45	
Amount paid in settlement without sales...	3,293.69	
Amount paid on service of notices of seizure..	17,238.69	
Amount paid by W. S. Moody, for ac. of Wm. J. Delano, at sales	7,483.58	
Amount paid by Wm. Van Norden, for ac. of Warren J. Delano, at sales	127.76	
Amount paid by M. S. Cox, for ac. of Warren J. Delano, at sales	1,364.53	
Amount paid by Chas. Harvey, for ac. of Warren J. Delano, at sales	27.00	
Amount paid by Geo. C. Norcross, for —, at sales	43.28	
Amount paid by Wm. Bogart Bowers at sales.	808.86	
		32,466.69
Total amount of drainage tax collected by civil sheriff		$32,466.69
Amount of writs advertised, but settled before the sale	$3,293.69	
Amount of sales paid by *bona fide* purchasers.	2,079.45	
Amount of sales paid by Van Norden, Moody, & others	9,855.01	
Amount paid on notices of seizure only ...	17,238.54	
		$32,466.69
Amount collected on notices only	$17,238.54	
Amount collected after advertisement	15,228.15	
		$32,466.69

Number of writs advertised, but settled without sale	76
Number of writs not sold, for want of bidders	121
Number of writs sold to *bona fide* bidders	10
Number of writs sold to Van Norden, Moody, Delano, Bogart, and others	59
Number of writs stayed by judicial proceedings	12
Number of writs stayed by order of city attorney	33
Total number of advertised writs	311

357 *Agreement.*

Filed Jan. 21, 1898.

United States Circuit Court, Eastern District of Louisiana.

JOHN G. WARNER
vs.
CITY OF NEW ORLEANS. } No. 12350.

It is agreed, that the record in the succession of Patrick Irwin, offered and introduced in evidence by defendant, shows the following facts:

That the executors of Irwin, in accordance with the law of Louisiana, filed in the second district court, the probate court of the parish of Orleans, the final account of their administration of their trust as executors; that on this account there *was* exhibited the property and sums of money in their hands as executors, and also a list of debts and charges against the succession which they proposed paying out of the assets in their hands; that upon this account there appeared no sum as due on account of drainage taxes; that the city of New Orleans opposed the homologation or approval of the account by the court, on the ground that it omitted as a debt or sum due by the succession two amounts assessed as drainage taxes against certain property owned by Irwin, situated in the first drainage district, and another against property owned by Irwin situated in the fourth drainage district; E. C. Palmer also opposed the homologation of the account, as the owner of drainage warrants exceeding $300,000.00, which he averred were entitled to be paid out of the drainage taxes claimed by the city, and hence joined the city in her opposition.

There was judgment of the second district court sustaining the opposition of the city, and ordering it to be placed upon the account as a creditor for drainage taxes in the sum of $5,860.27, evidenced by a judgment rendered in March, 1873, this sum being that assessed on property in the fourth district; the district court omitted to pass upon the succession's liability for the sum assessed on the property in the first district, and it also omitted to pass upon the opposition of Palmer.

On appeal, the supreme court of the State, as is shown by its opinion and decree reported in the official reports of the decisions of that court, volume 33 of the Louisiana Annual Reports, pp. 63 to 78, which it is hereby agreed shall be considered as introduced in evidence and forming part of the record herein, and for the purposes of evidence to be read whenever required from the said volume of official reports, reversed the judgment of the district court so far as it placed the city of New Orleans on the executor's account for the said sum of $5,860.27, and further, dismissed the opposition of the city of New Orleans and of Palmer, for the reasons and on the grounds stated in the said opinion.

358 This agreement to be in lieu of the offer of the judicial record as appears in defendant's note of evidence.

(Signed) R. DE GRAY,
ROUSE & GRANT,
Sol's for Compl't.

(Signed) SAM'L L. GILMORE, *City Att'y.*

Intervening Bill of Complaint of James Jackson.

JAMES W. PEAKE
vs.
THE CITY OF NEW ORLEANS. } No. 11614.

The intervening bill of complaint of James Jackson, a subject of the Queen of Great Britain, in the above-entitled suit of James W. Peake against The City of New Orleans, No. 11614 on the docket of this honorable court.

To the honorable the circuit court of the United States for the eastern district of Louisiana:

Your orator avers that he is an alien and a subject of the Queen of Great Britain.

That since the year 1879 he has been the holder and owner of eight drainage warrants, issued by the city of New Orleans according to law and similar to those described in the bill of complaint of James W. Peake, the original plaintiff in this suit; that all said warrants are dated June 6, 1876, and are numbered from 322 to 329, both inclusive, and are each for the sum of $5,000, except No. 322, which is for the sum of $10,000, making in all an aggregate sum of $45,000.

That your orator, on 8 April, 1887, instituted suit on said warrants on the law side of this honorable court, and on December 3, 1887, recovered of the defendant, the said City of New Orleans, as provided by act No. 30 of 1871, as the successor of the drainage commissioners, established under acts No. 165 of 1858 and No. 191 of 1859, and the various acts amendatory thereof, the sum of forty-five thousand dollars ($45,000), with eight per cent. interest from June 6, 1876, and costs of suit; that your orator issued a writ of *fieri facias* on said judgment on 30 December, 1887, and the same was returned by the marshal on 8 March, 1888. No property found after due demand, all of which will appear by the record of said suit, numbered 11558 on the docket of this honorable court.

Your orator is similarly situated with the complainant, James W. Peake, and desires to unite with him in the prosecution of this suit and to avail himself of the invitation given by the said complainant to all holders of drainage warrants to come in and aid him in conducting this suit and to participate in the burdens and in the results thereof.

Wherefore your orator files this intervening bill of complaint and unites with the complainant, James W. Peake, in all the averments

contained in his bill of complaint filed herein, and accepts
359 the situation of the case as it now stands, with the exhibits and evidence already taken by the complainant or offered by him as testimony in the cause, and submitting to be bound as far as said complainant is bound by the testimony already adduced by the defendant.

And your orator unites with complainant in his prayer for a decree, with the addition that your orator be paid the aforesaid sum of forty-five thousand dollars, with 8 % interest from June 6, 1876, and costs of suit, and your orator also prays for such relief as the nature of his case may entitle him to.

(Signed) THOS. J. SEMMES,
Sol. for James Jackson.

NOTE.—The bill and answer of the defendant in the case of James W. Peake *vs.* The City of New Orleans, No. 11614, of the docket of the U. S. circuit court, eastern district of Louisiana, (in connection with which the foregoing intervening bill is offered), is omitted from this transcript as per agreement at page 53 of this transcript.

Decree. Entered and Filed May 31st, 1889.

United States Circuit Court, Eastern District of Louisiana.

JAMES WALLACE PEAKE ET AL.
vs.
THE CITY OF NEW ORLEANS. } No. 11614. In Equity.

This cause came on to be heard on the pleadings, master's report, exceptions thereto, and the proofs on file, and was argued by counsel.

Upon consideration whereof it is ordered, adjudged and decreed that said exceptions to said master's report be sustained and the statement of the account by the master be amended so as to conform to the opinion of the court herein, and that the bill be dismissed at the cost of the complainant.

In open court, May 31st, 1889.

(Signed) DON A. PARDEE,
Circuit Judge.
EDWARD C. BILLINGS,
District Judge.

Motion and Order to File Mandate, etc.

Extract from the Minutes, April term, 1891.

NEW ORLEANS, *Saturday, June* 13, 1891.

Court met pursuant to adjournment.

Present: Hon. Edward C. Billings, district judge.

JAMES WALLACE PEAKE ET AL.
vs.
THE CITY OF NEW ORLEANS. } No. 11614.

On motion of Carleton Hunt, city attorney for New Orleans,

solicitor for the defendant herein, and on presenting to the
360 court the mandate of the Supreme Court of the United States affirming the decree entered in this cause on May 31, 1889,

It is ordered by the court that the said mandate be filed, recorded and executed.

And the said mandate is in words and figures following, to wit:

Supreme Court of the United States, October Term, 1890.

JAMES WALLACE PEAKE & AL.
vs.
THE CITY OF NEW ORLEANS. } No. 852.

Mandate.

"And whereas, in the present term of October, in the year of our Lord one thousand eight hundred and ninety, the said cause came on to be heard before the said Supreme Court, on the said transcript of record, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this court that the decree of the circuit court in this cause be and the same is hereby, affirmed with costs; and that the said defendant, The City of New Orleans, recover against the said complainants for its costs herein expended and have execution therefor.

March 9, 1891."

Petition, Answer, and Judgment, Marked Defendant L 2.

Filed Jan'y 17, 1898.

United States Circuit Court.

JAMES JACKSON
vs.
THE CITY OF NEW ORLEANS. } No. 11558.

Petition. Filed April 8, 1887.

To the honorable the circuit court of the United States for the eastern district of Louisiana:

The petition of James Jackson, who resides in New Orleans, with respect represents that he is an alien and subject of the Queen of Great Britain; that the city of New Orleans, a municipal corporation created of the laws of Louisiana and domiciled in New Orleans, is indebted to the petitioner in the sum of forty-five thousand dollars with 8 % from June 6, 1876, for this: that petitioners (is) the holder and owner of eight drainage warrants issued by the city of New Orleans on June 6, 1876, in accordance with the provisions of an act of the General Assembly of Louisiana No. 30 of the year 1871, entitled "An act to provide for the drainage of New Orleans," and also under the provisions of an act of said assembly, en

titled "An act to authorize the city of New Orleans to
361 assume exclusive control of all drainage works in the drainage districts; to authorize the purchase of certain rights and property of the Mississippi & Mexican Gulf Ship Canal Company and its transferree and to provide for the manner of making said purchase and paying therefor in drainage warrants" being act No. 16 of 1876.

That said warrants were presented for payment to the administrator of finance and were indorsed by him as presented 6 June, 1876, but they were not paid; said warrants are numbered from 322 to 329, both inclusive, each warrant being for the sum of 5,000 —, except warrant numbered 322, which is for $10,000, and they are hereto annexed as part thereof; they are issued in favor of W. Van Orden, transferree of the Mississippi & Mexican Gulf Ship Canal Company, and they are indorsed by said Van Orden, who is a citizen of the State of New York.

Wherefore, your petitioner prays that the city of New Orleans, through its mayor, be cited to answer this petition, and after due proceedings be condemned to pay petitioner the sum of forty-five thousand dollars ($45,000) with 8 % interest from June 6, 1876, and costs of suit.

(Signed) T. J. SEMMES & LEGENDRE, *For Pet'r.*

Answer.

Filed May 3, 1897.

United States Circuit Court, Fifth Circuit and Eastern District of Louisiana.

JAMES JACKSON
vs.
CITY OF NEW ORLEANS. } No. 11558.

Answering, comes the City of New Orleans, and denies all and singular the allegations in plaintiff's petition contained, excepting in so far as hereinafter admitted.

Defendant states, that, in the year 1876, the legislature of the State of Louisiana, under the number 16 of the acts of that year, passed an act to authorize the city of New Orleans to assume exclusive control of all drainage works in the drainage districts; to authorize the purchase of certain rights and property of the Mississippi and Mexican Gulf Ship Canal Company, and its transferree; and to provide for the manner of making said purchase and for payment therefor in drainage warrants, by which act, the common council of the city of New Orleans was authorized and empowered to contract with said company and its transferree for such purchase; and by the third section of which act it was expressly and specially indicated that all the amounts to be paid should be paid in drainage warrants, which said warrants were issued in the name and form prescribed by act 30 of 1871; and it specially indicated that said warrants should be payable out of the drainage assessments; all of

which will appear by reference to said act No. 16 of 1876 and act No. 30 of 1871.

362 Your respondent denies that the city of New Orleans became, in any manner, responsible other than as commissioners of said drainage fund, and that under the law by which the plaintiff obtained said warrants, it was never intended that said warrants should constitute a claim against the city of New Orleans, payable in any event or contingency otherwise than out of the said drainage fund, and that said warrants were executed and accepted with full knowledge by all parties, and they cannot, in any event, become chargeable to the city of New Orleans, or payable by it otherwise than out of the said drainage fund. That the corporate officers of said city were *are* wholly without authority or competency to bind said city to pay, or provide means for said payment otherwise than out of said drainage fund.

That said warrants are not negotiable securities, and that the laws under which the same are issued, did not authorize the city of New Orleans to issue securities negotiable in form. That said warrants are not in the form of a note or bond, binding the city of New Orleans to pay absolutely a certain sum of money, but are merely orders drawn by one officer of the city upon another officer of the city, for the payment of sums specified in said orders out of a particular fund.

Respondent further alleges that the said acts, to which reference has already been made, were supplemental to and part of act 165 of 1858, act 191 of 1859, act 56 of 1861 and act 30 of 1871.

That said act 30 of 1871 has been declared null and void by the final judgment of the supreme court of the State, and in the decisions of the supreme court of this State, particularly in that of The Mississippi and Mexican Gulf Ship Canal Company *vs.* New Orleans, 35 Annual, p. 68, it was expressly held that the city of New Orleans was not liable, to any extent, for any sum whatsoever.

Respondent, therefore, alleges that said plaintiff is estopped and barred from claiming any relief in this proceeding from this defendant.

Wherefore, respondent prays that this suit be dismissed with costs and general relief.

(Signed) W. H. ROGERS, *City Att'y.*

Judgment.

Extract from the judgment book.

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana, November Term, 1887.

NEW ORLEANS, TUESDAY, *December* 3, 1887.

Court met pursuant to adjournment.

Present: Hon. Edward C. Billings, district judge.

363 JAMES JACKSON vs. CITY OF NEW ORLEANS. } No. 11558.

This cause came on this day to be heard.

Present: Thomas J. Semmes for plaintiff; Walter H. Rogers for defendant.

When the parties in the cause filed a stipulation waiving the intervention of a jury and thereupon the matter was taken up before the court. After hearing pleadings, evidence and counsel for the parties respectively the cause was submitted to the court upon the issues of fact as well as of law, and the court having considered the evidence and arguments of counsel, and being fully advised in the premises, finds the issues of fact raised by the pleadings in favor of the plaintiff.

It is, therefore, ordered, adjudged and decreed that the plaintiff, James Jackson, do have and recover of and from the defendant, The City of New Orleans, as provided by act No. 30 of 1871, as successor of the drainage commissioners established under acts 165 of 1858, and 191 of 1859, and the various acts of the legislature of Louisiana supplementary thereto and amendatory thereof, the sum of forty-five thousand dollars ($45,000) with 8 % interest from June 6, 1876, and costs of suit—both the sum recovered and cost of suit to be paid out of said drainage fund.

Judgment rendered December 13, 1887.

Judgment signed December 17, 1887.

(Signed) EDWARD C. BILLINGS, *Judge.*

CLERK'S OFFICE.

I, Edward R. Hunt, clerk of the United States circuit court for the fifth circuit and eastern district of Louisiana, do hereby certify that the foregoing four pages and a half do contain a true copy of the petition, answer and judgment in the case of James Jackson *vs.* City of New Orleans, numbered 11558 of the docket of this court.

Witness my hand and seal of said court, at the city of New Orleans, this — day of January, A. D. 1898.

[SEAL.] (Signed) E. R. HUNT, *Clerk.*

Document Marked Defendant M.

Filed January 17, 1898.

R. M. Walmsley, president. T. Wolfe, Jr., secretary.

Board of liquidation city debt, room 5, city hall, New Orleans.

NEW ORLEANS, *December 9th*, 1897.

Branch K. Miller, Esq., attorney board of liquidation city debt.

DEAR SIR: Replying to your inquiry of even date, I would reply that in accordance with act No. 30 of 1871, drainage warrants were issued, and under section thirteen of act No. 73 of 1872, they were

funded into seven per cent. gold bonds, to the amount of
364 $1,665,000 and that all of said bonds have either been funded into premium bonds or paid from the sale of four per cent. constitutional bonds, save five thousand dollars still outstanding, but not yet due.

Very respectfully yours,
(Signed) T. WOLFE, JR., *Secretary.*

(In purple pencil:) DEFENDANT I.

DEFENDANT N.—Copies of the testimony of James B. Guthrie, J. Ward Gurley, W. J. Willett, R. C. Shortridge, John L. Newman, Louis Laroque, N. J. Hoey, W. I. Hodgson, Jos. Desposito, and A. Aubertin, copied from the original offered in the case of James W. Peake *vs.* City of New Orleans; offered by defendants and filed January 17, 1898.

United States Circuit Court, Eastern District of Louisiana.

JOHN G. WARNER
vs.
CITY OF NEW ORLEANS. } No. 12350.

Copies of the testimony of witnesses who testified on behalf of defendant in the case of James W. Peake *vs.* City of New Orleans, taken before examiner O. B. Sansum on different dates; said testimony is offered in the above entitled and numbered cause of John G. Warner *vs.* City of New Orleans by the defendant.

This testimony was offered by defendant on the 10th of December, 1897, before H. J. Carter, Esq., special examiner.

Present: B. K. Miller, Esq., and S. L. Gilmore, Esq., counsel for defendant; R. De Gray, Esq., and Wm. Grant, Esq., for complainant.

United States Circuit Court, Eastern District of Louisiana.

JAS. W. PEAKE
vs.
CITY OF NEW ORLEANS. } No. 11614.

On reference before O. S. Sansum, special master.

Testimony Taken on Behalf of the Defendant under Order of Reference, at the City of New Orleans, this 29th Day of November, 1888.

Present: Carleton Hunt, Esqr., for the City of New Orleans; Harry H. Hall & White & Saunders, Esqrs., for the Board of Liquidation of the City Debt; Richard De Gray, Esq., for the plaintiff.

JAMES B. GUTHRIE, sworn for the defendant, says:

By Mr. HALL:

Q. You are a member of the New Orleans bar?
A. Yes, sir.

Q. Have you been connected with collection of drainage taxes?

365 A. Yes, sir.

Q. For how long?

A. Well, in one capacity or another, I have been connected with that matter ever since the year 1873 or 1874; the winter of 1873 and 1874 my connection began.

Q. State, in brief, your knowledge of this drainage matter, in so far as it has reference to the controversy involved here.

A. In 1873 or 1874 Mr. Van Norden had charge of the drainage work. I think then he was the financial agent of the Mississippi and Mexican Gulf Ship Canal Company; at any rate he had control of all the drainage warrants that were given for the labor of digging the drainage canals. He employed me as an agent of his to see the tax-payers, those who owed drainage taxes, and secure the payment of the taxes from these people. My method of doing that was, I employed a number of clerks and canvassers, and we then obtained lists at the city hall of the parties who owed on the drainage assessments. We saw them personally and solicited the payment of their taxes on the assessments for drainage, and we induced them to do so by giving them a discount; that discount was made through and by means of these drainage warrants. Van Norden furnished me these drainage warrants at a certain discount, and out of that discount I allowed the tax-payers a portion. By these inducements I prevailed upon a large number of people to pay their drainage assessments. I had an office on Gravier street, and I would deposit my warrants at the city hall in charge of the drainage bureau, and gave my drafts against the warrants until my taxes amounted to the warrants deposited.

Q. You were employed, as I understand, by Van Norden as the representative of the Mississippi & Mexican Gulf Ship Canal Co. to do this work?

A. Yes, sir.

Q. What proportion of the drainage taxes, comparatively speaking, was collected between 1874 and 1876?

Mr. De Gray, for the plaintiff, objects on the ground that what was collected is a matter of record and figures and not a matter of recollection.

A. I cannot remember.

Q. I mean was it greater or less part of it?

Same objection by Mr. De Gray.

A. I collected more taxes between 1873 and 1876 than I have ever done since.

Q. What was done with regard to the collection of the taxes upon improved property?

A. Well, we found very much less difficulty in collecting the taxes upon improved property than upon unimproved property.

Mr. DE GRAY: If the witness proposes to state anything that is

documentary, I object to his testimony as not being the best evidence.

366 WITNESS: These assessments for drainage were laid upon the superficial square foot, and therefore in case of a lot of ground that had improvements upon it the proportion existing between the real value of the property and the assessment would be very small. An improved lot might be worth $3,000 because of the houses upon it, and the assessment upon that lot for drainage purposes would not be over, probably, $10 or $12.

Q. And therefore, as I understand you, upon the improved property you collected without great difficulty the greater part of the taxes?

Mr. De Gray objects to the question as leading.

A. Yes, sir.

Q. Now, state about what, in round figures, how much money you collected from Mr. Van Norden from the time you undertook this work in 1873 up to 1876.

Mr. De Gray objects on the ground that the collections between these years are exactly demonstrated by the bills in the drainage bureau.

A. Well, I am quite sure I collected over $200,000; of course, this is a matter of memory, but from the business I should say that I collected fully or over $200,000 in taxes.

Q. How did the city receive these taxes, in cash or warrants?

A. These collections were partly in cash and partly in warrants. That will show that my work stimulated the payment of the taxes, while the bulk of it would go through my office on account of my personal work, and that there was a greater amount and more than would otherwise have been paid that would go to the city hall and was paid in cash, and that amount that was paid in cash would be absorbed by the warrant-holders directly from the city treasury.

Q. Who were these warrant-holders?

A. Mr. Van Norden was the only warrant-holder that I knew, as he controlled them. I got them from him, and the collections that I made were entirely represented by warrants—that is, direct. I paid for them in warrants.

Q. After the drainage bureau was organized by the city of New Orleans in 1876, did you or not continue the work of these collections?

A. Yes, sir.

Q. With what success?

A. Well, with the success—that at first was arranged very much as it had been going on.

Mr. De Gray objects on the ground that all the arrangements are in writing.

WITNESS: My success at first was about equal to the collections

in amount that I was making at the time that the change in the method was effected.

Q. Was there any change later on?

A. Well, very soon after that—that was in 1876 that I was
367 named collector by Mr. Van Norden and ratified by the city council. Then, I think as early as 1877, the legislature began to be inimical or show enmity towards the collection of the drainage and passed laws that very materially lessened the ability of the collector to collect the drainage taxes.

Q. Was that the only reason that impaired your ability to collect them?

A. Well, that was one of the reasons; but the main reason was that the cream of the taxes, so to speak, had been collected during the past three or four years of the taxes on improved property. There was a large amount of taxes due upon unimproved property, where the proportion of the taxes to the value of the property was so great that people hesitated very much as to the advisability of paying the taxes, and on many occasions it was much to their interest to abandon them and lose rather than pay these drainage taxes.

Q. Why was that?

A. Because the value of the lands, in many instances, was less than the assessment of the drainage. That was because the assessment was upon a superficial area. If you take a square of ordinary ground the drainage assessment would range from $250 to $300, and sometimes over that; on an average, $275 to $300 a square. In many instances, if the squares were put up at auction, they would not bring $300.

Q. In 1880 about what proportion of the drainage taxes were collected upon property which was worth more than the drainage tax—that is to say, did it equal or approximate the value?

A. I should say that from $\frac{7}{10}$ to $\frac{8}{10}$ of the taxes upon improved prope-ty and on valuable property had been collected. Now, I wish to state that there was much of this money for drainage assessments that had been collected previous to my taking hold of it all. There had been a large amount of the drainage assessments collected by the drainage commissioners—that is, before the city of New Orleans became subrogated to the rights and powers and duties of the old drainage commissioners.

Mr. De Gray, for the plaintiff, objects on the ground that the precise amount collected by the drainage commissioners up to the time that the witness took charge of this matter is a matter of figures, and that the record speaks for itself.

Q. These assessments which you undertook to collect were made under the act of 1858?

A. Yes, sir; the act of 1858 and the amendment of 1859 and 1861; then there was the act No. 30 of 1871.

Q. Had the fact of the long standing of these assessments any effect upon the collection of the drainage tax as to finding the people or the owners of the property?

A. Very great, because these assessments were made in the name

of the original owners of the property at the time the rolls were made up. These people, in a great many instances, could not be found at all, and when found they would say, "I sold that property years ago," and that would oblige me to go to the conveyance office and search out the title. Many times we done a great deal of work before we could find the owner, and that by means of the conveyance office and the assessments at the city hall; but that did not help us, because the square would have been divided up into lots and made different from the plan of the drainage commissioners. This inability to find the owners gave us a great deal of work that we did not contemplate at first in the collections.

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Q. I understand you stated a short time ago that the cream of these collections *and* been made about the time that the city took possession, and that up to 1880 probably from 7 to $\frac{8}{10}$ of the assessments upon the valuable improved property had been collected.

Mr. De Gray, for the plaintiff, objects on the ground that the question does not refer to the evidence as given by the witness or to the condition of things as disclosed by the witness as given.

Q. What would you consider to be the value of the unimproved property or property which figures upon the assessment-rolls to $600,000? What would you consider the value of that property to be, in so far as the same is available for the collection of these assessments?

Mr. De Gray objects to the question on the ground that it is too general; that it is not directed to any specific portion or locality of the 26,000 acres of land embraced in the drainage territory.

A. I do not know that I could answer that question as I understand you to put it. If you mean taking for granted that there are $650,000 for drainage due, it would be the estimation of the value of the real estate upon which the assessment is due.

Q. What I mean to say is this: Assuming there to be nominally $600,000 of uncollectible assessments, you know substantially the character of the property upon which this assessment rests?

A. Yes, sir; that the bulk of these assessments rests upon property not worth the assessment.

Q. Now, taking into consideration the expense of trying to collect that sum by legal means and otherwise on the whole of that property being insufficient to meet the legal costs of collection, how much of the money could be realized from these collections out of all this property?

A. I should say under $50,000. I do not think that any process with which I am familiar could be made to realize $50,000 out of the drainage assessment of the property belonging to individuals. Now, I want to say I cannot now remember whether this assessment of $50,000 of uncollected drainage has any reference to the assessments made upon the streets.

Q. I will ask the question without reference to the streets, public places and public buildings of the city of New Orleans. I exclude them from the question.

A. Well, excluding them from the question, and assuming that there are $600,000 in the aggregate of drainage assessments, and taking into consideration the necessary labor and expense to make anything like a collection, on reflection I would not say that
369 anything approximating $50,000 could be collected, and I want to say why: because, as I remember the properties and the assessments and my knowledge of the business, the great bulk of them rests upon property that could not be made to bring at a public sale the amount of the assessment.

Q. As a matter of fact, was there any attempt, either by you or Van Norden or by the commissioners, to sell that property?

A. Yes, sir.

Mr. De Gray objects on the ground that the attempt, if made under legal process, is a matter of record and of law and not of recollection.

A. Yes, sir; a great many of *fi. fa.'s* were issued and seizures were made and the properties sold, and, so far as I recollect, in almost every instance the property was bid in by Van Norden and paid for by the warrants in his possession and the taxes canceled in that mode. There may be a few cases wherein other people bid, but very few. When I say Van Norden bought them I mean the people he interposed in his name, and they got the warrants from him. I do not know that Van Norden used his name in all the sales, but almost the whole of them.

Q. In whose name would these sales be taken?

A. There was a Mr. Delano, in whose name a great deal were bought, and I think some of them were bought in Van Norden's name.

Q. What became of the property so adjudicated?

A. Well, there were one or two instances where the parties came to me and we arranged a settlement for the retransfer of the property and released the interests of Delano or Van Norden or whoever held it, but the great bulk of it—nothing has ever been done with it. The great bulk of it was not taken possession of, and I suppose the property had been abandoned for the taxes.

Mr. De Gray objects to all of the above.

Q. Did they ever pay, so far as your knowledge is concerned, any taxes upon it?

Mr. De Gray objects as a matter of record.

A. Not that I know of.

Q. Now, to what extent did you use your exertions to collect these taxes, and to what extent, if any, were you interfered with by the city attorneys, or were you aided by the city attorneys?

A. Well, I put forth every endeavor possible consistent with the means at my disposal to collect the taxes. I had a force of employés at work upon the matter, and I had frequent conferences with the city attorneys, and they all seemed disposed to help us along as far as possible, and they did give me all the assistance that I could ex-

pect from them. You see, the duty of issuing the *fi. fa.* was not mine; it was upon the city, and we had frequent conferences about that, and when we did issue a *fi. fa.* it was so unsatisfactory, and which had to be paid for by the city, that there seemed to be
370 very little encouragement to adopt that method, and the great bulk of it was done by personal solicitation and efforts from the office and other means.

Q. Who was the city attorney at that time?

A. Mr. Buck was city attorney for some time, but Mr. Blanc had special charge of that matter.

Q. What action did he take in the matter?

A. He aided me in a general way.

Mr. De Gray objects to what Mr. Blanc done in a general way.

WITNESS: Mr. Blanc and the other city attorneys—as they come into office I had frequent interviews with them, and we talked this matter of drainage over and the desirability of collecting the taxes; that it was very oppressive upon those who held the warrants, and I wanted to collect the taxes, as it was my duty and my interest in every way, and we were met at all times by the difficulties coming from the legislature.

Q. Not prior to 1877?

A. No, sir; not prior to 1877, but after 1877 the legislature was inimical to the drainage, and the decision of the supreme court did not encourage the drainage-tax payers to pay. When we brought a case we brought it for the purpose of attacking the constitutionality of the law, which I think was passed in 1877, which relieved a large portion of the whole section of the country back of Claiborne street. This district was entirely relieved by the legislature of the drainage assessment, and that law, after the delays incident to a lawsuit was pronounced unconstitutional by the supreme court. That law was such as to paralyze us.

Q. Up to the time of the rendition of the decision to which you refer by the supreme court I understand you to say that everything had been done that could be done for the collection of the taxes?

A. Yes, sir.

Q. Did you collect the amount you stated at a time prior?

A. Yes, sir.

Q. The greater part of all the collectible assessments had actually been collected?

A. Yes, sir; that is true.

Q. So that after all—state what material effect, in dollars and cents, if any, the rendition of that decision had upon the collection of the drainage taxes?

Mr. De Gray objects on the ground that it assumes a condition of things not disclosed by the witness.

A. The decision probably did not affect the matter in the amount, but it did in the number of collections that could be made, because every man who would read the judgment saw that the whole thing was gone, although there were four drainage districts.

Q. At the time of the rendition of this judgment to which you refer on the unconstitutionality of the act of the legislature what was the character of the collections—I mean to say as to value?

371 A. Well, on the unimproved property there was a great deal of taxes remaining unpaid.

Q. Were you, yourself, connected with the drainage bureau in the city hall?

A. Yes, sir.

Q. What is being done in the city hall now and what is being done by you?

A. Well, we have a force ready and make an effort to collect the taxes as fast as we can.

Q. What is being done with the money as you collect it?

A. It is all paid into the city treasury.

Q. What is it devoted to—what is being done with it—after being paid into the city treasury?

Mr. De Gray objects on the ground that it is a matter of figures and is all detailed in the reports and in the books.

A. Well, the money that goes into the treasury is used for the expenses of the drainage bureau, and whatever surplus there is it goes to the credit of the warrants; there is not much surplus these days.

Q. Do you know anything about the character and location of the property bought by the drainage commissioners?

A. Yes, sir.

Q. What is the character of the property?

A. Well, it is very low, swampy ground, under water, and lies along the edge of the lake; there is a little rim of property lying between it and the lake; and in some places I think the property touched upon the lake, but the bulk of it was property beyond the Metairie ridge and between there and the lake.

Q. Did you ever make a personal examination of it?

A. Yes, sir; I went over the property.

Q. Did you make any estimate of its value; if so, what was it?

A. I did not think it was worth anything.

Mr. De Gray objects on the ground that there is no evidence that the witness is a judge of the value of real estate in any respect.

WITNESS: I would say that I would not have taken the whole of it as a gift from anybody to pay the taxes on it.

Mr. De Gray objects to the addenda not called for by the question, and on further ground that what the witness would or would not do is no indication of what other people would do.

Q. What was the policy, as evidenced by their actions, of the Mississippi & Mexican Gulf Ship Canal Co. in regard to enforcing the collections of these assessments by the sale of this character of property?

Mr. De Gray objects to the question on the ground that what was

done is best evidenced by an examination of the records on which it was done.

A. Well, the representatives of the Mississippi & Mexican Gulf Ship Canal Co. were very anxious to have all the taxes for drainage collected if possible, and my remembrance is that it was at the suggestion of that company or its representatives that I made this examination of the property with the view of seeing whether these properties that belonged to the drainage commissioners and had been taken in the purchase of drainage assessments could not be sold and something realized from it that would help the warrant-holders, and my report was——

Mr. De Gray objects to the report of the witness; if it is in writing produce it.

WITNESS: It was not in writing, but it was to the effect that it would not do to sell the property, because I did not think it would pay for the advertisements.

Q. When they had to deal with that character of property did they or not attempt to sell it? What was their policy or line of conduct with regard to that, where they made up their minds or you made up your mind that that property was not worth the assessment?

A. Why, then we let it alone and did not do anything with it.

Q. Was any property sold by these commissioners or by you for anything less than the assessment?

A. No, sir; under the law it could not be sold for less than the assessment, but it did not bring the assessment. In every instance out there the assessment was greater than the value of the property.

Q. When a sale was made to collect the drainage taxes what effect did that have upon the city taxes?

Mr. De Gray objects to the question and the answer.

A. It did not affect or cancel the city taxes, and — purchaser bought the property subject to all other taxes existing at the time. I want to say right there that the collection of the city and State taxes had a great and marked effect in depressing the collection, because these properties lying back of the city, where the bulk of the tax assessments are to be found, had so depressed in value that the owners had refrained from paying taxes for many years, and in a great majority of instances they complicated the collections and the advisability of trying to realize the drainage tax from any forced sale.

Q. What effect had the proclamation of the mayor upon your efforts and of the city attorneys to collect these taxes, if any?

A. Well, we did not pay any attention to the mayor's proclamation; we did not regard it as anything binding upon us, and the city attorneys did not. We did as much to collect the taxes afterwards as we did before.

Q. What effect did the action of the supreme court on the acts of 1877 have upon your conduct?

A. Nothing whatever; we made efforts, but the success of our efforts was somewhat lessened by it.

Q. Do you know whether or not the Mississippi & Mexican Gulf Ship Canal Co. at the time of the transfer to Van Norden was solvent or insolvent?

373 Mr. De Gray objects on the ground that it has no possible connection with any issue in this case, and on the further ground that no date is specified.

A. Well, I have no positive knowledge of it, but my impression is that that company was not solvent at that time.

Mr. De Gray objects on the ground that impressions are not evidence.

Q. Who held the greater number of these drainage warrants at all times that these warrants were issued, as far as they were presented for payment at the city hall and as far as the taxes were paid in drainage warrants during your connection with the drainage system?

A. All the warrants that were used for the payment of the taxes belonged to or were under the control of Van Norden.

Q. Who was injured by the payment of the taxes in these warrants, if anybody? In other words, if the payment of the taxes was in warrants and Van Norden held these warrants, who got the benefit of them?

A. Van Norden got the benefit of them; the taxes were payable in warrants to benefit the tax-payer, and the tax-payer did pay in warrants, and Van Norden was benefited because the tax-payer paid less.

Q. When there was cash paid into the city hall how was that cash taken out?

A. The cash was exchanged for a drainage warrant.

Q. Who held this warrant?

A. I do not know, except Mr. Van Norden and his representatives.

Q. You spoke just now of the issuing of a large number of *fi. fa.'s* Can you recall anything else that was done by the drainage bureau with regard to the collection of this tax?

A. Well, we put forth a great deal of work and effort to revive the judgments. These judgments were rendered a great many years ago; they were rendered at different dates in the various drainage districts. When the first judgment was expiring, why, we put forth a tremendous amount of work to revive these judgments, and I remember in the second drainage district I paid out a great deal of money in paying canvassers and deputy sheriffs to revive these judgments, wherever we could find the parties. I also served the present owners where we could not find the original owners.

Q. How many suits of that kind were brought?

A. There was a suit for each judgment; the defendants, of course, were very numerous. I do not know that I ever done work harder than that; there were hundreds of defendants. In many instances we found a state of facts like this: A square of ground had been sold out in lots, the original owner dead, and then we made an effort to cite in the present owners, of those that had not paid in the square.

The witness, being shown the yellow document marked A. Z., says: This is a sample of the notices that were issued from
374 the drainage bureau by me, and I will say that we issued a notice like that to every tax-payer who owed the drainage where we could possibly find him, and in hundreds of cases these notices were delivered personally by my clerks to the parties, because we found it was utterly impossible to trust to the mails for them, for in many instances they could not be found, but by having a personal inspection we found where the parties were or where they went. There were hundreds and thousands of these notices issued by me.

Q. In issuing writs of *fieri facias* against debtors for drainage tax who prepared the description of the property?

A. The descriptions of the properties were prepared by us in the drainage bureau and then handed to the city attorney.

Q. Was that much work?

A. Yes, sir; involving a great deal of work, because we described the property minutely by metes and bounds and by measurements.

Q. After all this testimony what is it which you gentlemen charged with this matter could have done in the collection of these drainage taxes that you did not have done?

A. I do not know that we could have done—that we could have done judiciously. We could have issued more notices and paid more costs.

Q. What was the character of Mr. Blanc, to whom you referred, as city attorney for energy, etc.?

A. He was a man of thorough energy and perseverance—a man of great push. He was of very great service to me, and was really enthusiastic in his endeavors to collect. He done everything that could be done.

Q. What have you to say with reference to the other city attorneys and assistant city attorneys in that matter?

Mr. De Gray objects on the ground that it is of no consequence, as the question is, Have the parties done all they could? and the court will determine that.

WITNESS: I will say that the city attorneys from Mr. Blanc—I do not remember who the city attorney was in 1876 if it was not Mr. Blanc; but it seems that I had so much to do with Mr. Blanc in the matter. It seems to me he must have been in when I went in as collector; but we had many consultations together in regard to the forms to be printed for the court proceedings.

Q. How about the expense of the clerk hire—of keeping this matter going?

A. Well, the drainage bureau—it was paid by me from my receipts in the bureau, and then the city attorneys were always efficient and helpful in the matter of oppositions where the drainage taxes were due upon properties in insolvency and successions. We would furnish them with lists of the properties, and the city attorneys would file oppositions, and some collections were made in that way.

Mr. Hall offers in evidence, in connection with the testimony of this witness, the document marked A Z, as follows:

Drainage District, Drainage Bureau, Department of Public Accounts, City Hall.

NEW ORLEANS, *May* 17, 1880.

W'd I. Weber:

You are hereby notified that you are indebted to the city of New rleans for the drainage assessment on your property in square No. 70, lot 6 or 10, on Solidelle, St. Anthony, Bagatelle, Prosper St., mounting to $19.80, less am't paid on account.

A desire to save you the annoyance and heavy costs incident to seizure and sale of your property by the sheriff prompts me to erve you this last notice, and unless the payment is made immediately a *fi. fa.* will be issued and the property advertised and sold ccording to law.

JAMES B. GUTHRIE,
Collector of Drainage.

By Mr. HUNT:

Q. Was not that property usually under water when it rained?

Mr. De Gray objects to the question as leading.

Q. What was the condition of that property during rain-storms, when they prevailed?

Mr. De Gray objects because the preceding question is the basis of the second.

A. With reference to the property lying back of the city at the Metarie ridge?

Q. Yes, sir.

A. Well, it was swamp, and in rainy weather it was covered with water.

By Mr. HALL:

Q. There is a statement here issued from the city hall, entitled "recapitulation" of the amount of the Mississippi & Mexican Gulf Ship Canal Co. drainage warrants changed into gold bonds, which will be offered in evidence here, and upon the first and second pages of that statement it appears by the recital herein that gold bonds were issued in 1872 to a Mr. J. W. Pearce, to Robert Shortridge, and to W. E. Willett. Who are these three gentlemen?

A. Mr. Pearce was a clerk of Mr. Van Norden.

Q. Who was Mr. Shortridge?

A. Mr. Shortridge was a nephew of Mr. Moody, and was at one time a clerk of Mr. Van Norden.

Q. Who was Mr. Willett?

A. Mr. Willett was another nephew of Mr. Moody, and Mr. Willett is also an employé of Mr. Van Norden on the drainage-boats as engineer.

376 Q. What connection had the Mr. Moody referred to with Mr. Van Norden?

A. Mr. Moody was Mr. Van Norden's general superintendent of work.

Q. Had any of these gentlemen—Pearce, Shortridge, or Willett—any interest in these gold bonds issued?

A. I do not think so; I cannot say.

Q. Here appears on the 10 of May, 1872, gold bonds issued to I. W. Pearce, amounting to $54,000; on the 16th of May, $22,000; on the 19th of August, $35,000; on the 12th of August, $37,000; on the 10 of September, $38,000; on the 12th of October, the sum of $30,000—in 1872.

A. I cannot say that Pearce was a clerk of Van Norden at that time. He had been a clerk of Mr. Van Norden when Van Norden was engaged in the butter and cheese business on Tchoupitoulas street; but my impression is that in 1872 Van Norden had closed that business up, but Pearce had been a clerk of his.

Q. What was Pearce doing in 1872?

A. I do not know.

Q. Where is he now?

A. I do not know.

Q. Was he a man of large means—a capitalist?

A. Well, the dates—I cannot remember them. Mr. Pearce inherited some money from his father. I think his father had not died as early as 1872, and my impression is that Pearce came into some money from his father in 1875 or 1876.

Q. Then in 1872 or prior to 1872 he had been a clerk of Mr. Van Norden?

A. He had been a clerk of Van Norden up to the time that Van Norden closed his butter and cheese business. Mr. Pearce was a clerk in his store.

By Mr. SAUNDERS:

Q. Was he ever employed by Van Norden after Van Norden took charge of the drainage?

A. I do not think he was.

By Mr. HALL:

A. Was he a capitalist, a man likely to have a large amount of money?

A. No, sir; he was not.

Q. Who was Robert Shortridge in 1872?

A. Shortridge is, as I said, a nephew of Mr. Moody.

Q. What was his business or occupation?

A. My remembrance is that just at that time—I cannot say, but I remember Shortridge as time-keeper for Mr. Van Norden in the drainage work.

Q. Was he a man of large means?

A. No, sir; he has never been a man of large means. At that time he was not. In 1880 he married a lady of some means, but before that he was quite poor.

377 Q. Where is he now?

A. I think he is in the city of New Orleans. I think he was a deputy marshal.

Q. You say that Mr. W. E. Willett was also a nephew of Mr. Moody?

A. Yes, sir.

Q. Was he a clerk of Mr. Van Norden?

A. Yes, sir; he was an engineer on the dredge-boat.

Q. Was he a man of means?

A. No, sir.

Q. Is he living now?

A. Yes, sir; I think he is. I saw him last summer at Carrollton. My impression is that Van Norden got all these bonds, recited, because these parties were merely the representatives of Van Norden.

Cross-examination by Mr. DE GRAY:

Q. I understand you to say that you were appointed or employed by Van Norden sometimes to collect the drainage taxes? Will you designate the date, as nearly as you can?

A. I think it was in the spring of 1874 or the late fall of 1873. I should say it was between December, 1873, and February, 1874. I think that was when I first made my connection with him in that respect.

Q. When did you enter actively on the duties of your office?

A. Immediately in the spring of 1874.

Q. Was Mr. Van Norden the collector of the drainage taxes?

A. No, sir; he *has* (was) the holder of these warrants.

Q. He was the representative of the Mississippi & Mexican Gulf Ship Canal Co. in doing the work?

A. Yes, sir.

Q. Whose duty was it, under the law, to collect the drainage taxes? Was it Mr. Van Norden's or the city of New Orleans'?

A. Well, the city of New Orleans'. The administrators of the city of New Orleans at that time were subrogated to the powers and duties of the old drainage commissioners. If it was anybody's duty I suppose it was the duty of the administrators of the city at that time.

Q. Why should Van Norden undertake the collection of the drainage tax through you if it was the duty of the city of New Orleans to collect them?

A. I do not know why, excepting that he had confidence in my ability to collect the tax.

Q. Why should he be called upon to collect them when he was the recipient of the tax, when it was the duty of the city of New Orleans to collect them and pay them to him?

A. I do not know why he should, excepting the fact that I have stated—that he wished me to do it.

Q. Now, was it not because the city of New Orleans showed
378 great reluctance to enforce the drainage tax that he employed you to enforce the collection in order that he might get what was due him from the city?

A. Well, the taxes were not collected sufficiently rapid to suit the demands of Mr. Van Norden, who was doing the work.

Q. How much had the city of New Orleans collected up to the time it took charge—up to the time you were employed? The city had taken it in 1871, and you undertook the work of these collections in January, 1874, or the spring of 1874?

A. Yes, sir.

Q. How much did the city collect up to that time?

A. I cannot say.

Q. Was it not a very inconsiderable amount?

A. Well, it was not a very great deal up to that time.

Q. Was it not true that up to that time the city did not put forth any efforts to collect these taxes at all?

A. Well, so far as I know, there was no effort beyond the keeping of its offices open.

Q. If anybody came there they took the money, and that was all the effort that was made? Is not that the fact?

A. So far as I know, yes. I do not know anything about that.

Q. You were examined as a witness in a certain case that Van Norden brought against the city of New Orleans—a mandamus case—reported in the 26th Annual of the annual reports, were you not?

A. I do not remember.

Q. Do you want me to read to you the evidence that you gave in that case?

A. Yes, sir; if you have it, because I certainly have no remembrance of it.

Q. Did you not testify in that case that when you approached parties who owed the drainage tax the principal reason that they gave for not paying it was that the interest on the drainage was only 6 per cent., while money in the market was worth 8 per cent., and that they did not propose to pay the taxes as long as the city did not compel them?

A. I do not remember, but, as a matter of fact, I remember people saying these things to me. I cannot say, however, that such was the universal manner of acting.

Witness being now shown the evidence as given by him in the mandamus case just referred to, is asked whether or not the facts as therein stated, which he gave in that case, are correct.

Mr. Hall, for the board of liquidation, objects, as it is not proven that that is the evidence which the witness gave, the document not being authenticated; and, secondly, he objects to the offering of any testimony heretofore given requiring, as the counsel for the complainant has done, that the witness be examined *de novo*, his testimony taken down, and placed in the record. Mr. De Gray having stated that the testimony of Mr. Guthrie herein referred to was, as

a matter of fact, rendered in the case entitled "The State on
379 the relation of Van Norden against The Mayor, etc., No. 5735," and that he knows it to be a correct copy, the objection as to the necessity of having it certified is hereby withdrawn.

WITNESS: This all seems to me as though the facts there are correct with the exception of the facts as to the amount that they collected being merely nominal. I think that referred to this unimproved property.

Q. In February, 1875, were not the collections merely nominal?

A. My recollection is that the collections were going on quite briskly in 1875.

Q. What do you call briskly?

A. I do not know what; "merely nominal." I should say now that the collections were merely nominal.

The testimony referred to by the witness is the testimony read and filed in this case in 1888.

Q. What do you say in reference to that testimony? Is it correct or not?

A. Well, I say that the testimony, as a general thing, is correct; but I should say with regard to that question, as to the amount of the collections being merely nominal, I may have said what is there, but it would not have been the fact at that time, because I think I must have misunderstood the question. It seems to me that remark referred to properties that were unimproved; but about this per cent. interest, I can remember people saying that; a great many people said that to me; there must have been a report made at that time. I should say that my impressions at that time were correctly stated, but the only thing that I see in this testimony that I do not agree to is that I stated my collections were merely nominal. I suppose that means in comparison with the collections at the start.

Q. What would you call a brisk collection of the drainage tax—for instance, how much a month?

A. Well, a brisk collection would have reference to the amount of good, collectible taxes or the proportion of good, collectible taxes that remained to be collected.

Q. You used the words "brisk" and "merely nominal" in connection with these taxes; I ask you the meaning of the words as thus used.

A. Well, I would have to refresh my mind by a reference to the books before I could answer that intelligently.

Q. At the time that you gave that testimony, in February, 1875, your recollection certainly must have been better at that date as to facts that immediately preceded it than your recollection now as to these facts, was it not?

A. Well, I merely wanted to say about the word nominal that that must be understood with reference to and in comparison with the results of my labors anterior to that date, because if I had been asked now how the collections were going on in 1875, my remem-

brance would have led me to believe that I was collecting a great deal of taxes in 1875 without reference to my books at all.

380 Q. Then you were employed and paid for your services by Van Norden?

A. Yes, sir; at that time.

Q. This man to whom the drainage tax was due for digging the canals and building the levees?

A. Yes, sir; as the holder of the warrants.

Q. You have spoken of interviewing the holders or parties that owed the drainage tax and offering to them warrants for less than their face. How much less than their face?

A. Not offering the warrants, but offering to pay the tax. I simply undertook to settle the taxes at a discount.

Q. Then they paid you the money in lieu?

A. My remembrance is that I paid the taxes at 10 per cent. discount.

Q. Mr. Van Norden lost on his warrants how much?

A. Well, of course I had a commission in addition to that.

Q. How much was taken off the face of the warrant for the benefit of the party who used it in paying taxes?

A. My remembrance is that it was always fully 5 per cent. and sometimes 10; in larger bills they got a larger discount.

Q. What were your charges?

A. My agreement with Mr. Van Norden was that he should sell me the warrants at a specified discount; my remembrance is that I bought the warrants from him at 85 cents.

Q. Mr. Van Norden lost on all the taxes that were paid after you took charge up to the time of the transfer to the city of New Orleans 15 cents on the dollar?

A. On all taxes that passed directly through my hands.

Q. Yes; in drainage warrants?

A. Yes, sir; there were some payments made. There were some taxes paid on account of my serving them with notice. I did not go and get them at the city hall.

Q. But all the drainage warrants passed through your hands?

A. Yes, sir.

Q. Now, you have spoken of the legislature passing certain acts that were hostile to the collection of the drainage tax, that affected their collection. While these acts were under discussion before the legislature, did you or did you not write a letter to the legislature expressive of your views upon the drainage tax?

A. Yes, sir; I did. I made an effort.

Q. Have you got that letter?

A. I think I may have a copy of it some place among my papers, but I do not know.

Q. It was printed?

A. Yes, sir; it was.

Q. You have a copy of it?

A. I cannot say positively, but my impression is I may have a copy of it; that was in 1877, in the legislature at Odd Fellows' hall, I made an effort to defeat the passage of the drainage law.

381 Q. I understand you up to 1877 that all the taxes except on the swamp lands had been paid, and that the swamp lands were not worth the taxes; is not that the bulk of your examination?

A. Well, the greater portion of the taxes due in 1877 were on lands in the back portion of the city.

Q. If the lands were not worth the taxes assessed on them why did you try to impress upon the legislature their duty in the premises? If it was not worth anything, why did you bother yourself about it?

A. Well, I considered it my duty to prevent the passage of these laws.

Q. To prevent the passage of the law and enforce the collection of the taxes, which, in your judgment, could not be collected?

A. Well, I could try and collect it. I was collector of the drainage. At the head of the drainage bureau it would be my duty to do everything I could to inform the legislature of the State of the facts and persuade them not to pass the law.

Q. But they did pass it?

A. Yes, sir; I saw Governor —— about it.

Q. Did you print your letter?

A. Yes, sir; it was a printed statement of whatever it was.

Q. And put upon the desk of each member of the legislature?

A. Yes, sir; I suppose that you have got a copy of it.

Q. You have spoken of these rolls being very old when you came in charge of the land, and that the ownership had changed; will you tell us about when the assessment-rolls in the first drainage district were homologated?

A. I would not attempt to give the dates. I think I could approximate the rolls to the first drainage district.

Q. Yes; try and do it.

A. I do not know the records of the judgments in each case. They will show the dates at which the rolls were homologated, whatever the dates may be.

Q. How long have you been a lawyer practicing in Louisiana?

A. Since 1879.

Q. You have had a law office since that time?

A. Yes, sir.

Q. And engaged in general practice?

A. Yes, sir; I have had two offices, one a law office and also an office at the city hall, or a desk there.

Q. How many hours a day did you spend at the city hall?

A. I did not go to the city hall very often.

Q. Very often is very indefinite. Do you call it once a month?

A. Yes, sir; much oftener than once a month. I have had a clerk there that always spent several hours a day at the city hall.

Q. How do you know how many hours he spent a day there if you were not there yourself?

A. I do not know; but I know he was placed there by me, and he would perform the duties incumbent upon him as my represent-

ative. My duties as collector did not require my presence in the office very much; my duties required me outside.

382 Q. While you have been practicing law for the last five years what efforts have you made on the outside for the collection of the drainage tax?

A. Well, when a man begins to practice law he does not have a great deal of practice; I gave a great deal of my time for the first five years to drainage matters.

Q. What did you do?

A. I cannot remember since 1879 the exact details of my efforts, but I issued these notices and mailed them; I did not write them all myself.

Q. Is that notice A. Z. in your handwriting?

A. No, sir; that was written by my clerk; they were constantly written by my clerks and delivered.

Q. You instructed them to do that?

A. Yes, sir.

Q. Do you know whether they did it or not?

A. Yes, sir; frequently these notices here would bring the parties to the city hall, and if I was not there they would come to the office and see me.

By the MASTER:

Q. The question is what you have done personally?

A. I had the general supervision of that business.

By Mr. DE GRAY:

Q. That is too indefinite; I want to know what you did.

A. I superintended the matter of compiling and looking over the records to see where these notices should be sent; I had the responsibility and charge of the work.

Q. I ask you again for the acts that you in person did since you have been a practicing lawyer looking to the collection of this drainage tax?

A. I do not remember individually; but I have seen the individual parties and made efforts to arrange for the payment of them taxes.

Q. When do lawyers usually go to court in the city of New Orleans? What time of day?

A. About 11 o'clock, and got through at 3.

Q. Did you ever see any of these tax-payers during the hours between 11 and 3 while you were in court?

A. No, sir; but I employed the best man there was raised in the drainage bureau that has been employed by me, and he has given his time to that matter, and was more efficient than I was up there.

Q. Do you remember the case of Henrietta Davison against The City of New Orleans?

A. Yes, sir.

Q. You remember the law as to that case?

A. Yes, sir.

Q. Is it not a fact that since the decision in the Davison case it

has been impossible to enforce by execution any drainage tax
383 in the State of Louisiana where the tax-payer saw fit to resist it on the ground that where no benefits have been conferred it was inequitable and unjust to enforce the tax?

A. I do not think any *fi. fa.* has been issued since that decision, but whether because of that decision I cannot say.

Q. Well, the question is, is it not true that since the Davison case, which is the settled jurisprudence of Louisiana, a drainage judgment cannot be enforced by executions?

Mr. Hall objects to the question as an attempt to elicit from the witness an expression of his opinion as to the law of the State, and it is not competent for him to do so.

A. I would not undertake to say what was the settled jurisprudence of Louisiana.

Q. Now, I ask you, as you have been charged exclusively with the collection of the drainage tax since 1876, whether it is not a fact that in very, very numerous cases the tax has been erased from the rolls or the judgments have been declared null on the grounds laid down in the Davison case?

A. Yes, sir; there were a great many erasures on the ground of the Davison decision?

Q. Is it not true, no matter where the property is situated?

A. Well, I believe the plaintiff in the rule is obliged to show that there was no benefit, and that is easily done by the parties out beyond the ridge or between the ridge and Claiborne street.

Q. Is it not true that no benefits have been conferred because the drainage system was not complete?

A. I believe so.

Q. You are familiar with the system of drainage as an entirety?

A. Yes, sir.

Q. Under that system was it not the duty of the city of New Orleans to protect the city by a protection levee along the entire lake front and joining the return and lower protection levee?

Mr. Hall objects on the ground that it elicits from this witness an opinion as an engineer, and it is not shown by the testimony or otherwise that he is an expert, and that he is asked, further, to express an opinion as to what the duty of the city of New Orleans was when it was only competent for him to state facts and not give opinions.

A. I believe the drainage work as laid down contemplated a protection levee on the lake of what you speak of, joining that protection levee above and below the city. The drainage plan, as I understood it, comprehended the building of these protection levees and the building of these various canals running between them, and if this work was well done and the proper drainage machines built at the mouths of the various canals my impression is and always has been that the drainage would have been a success instead of a failure.

Q. Do you mean that is your impression or your judgment?

384 A. I mean that is my judgment; of course I am not an engineer.

Q. Mr. Van Norden in doing this work extended the Orleans canal into the lake?

A. Yes, sir.

Q. Was there or not any lock contemplated—that there should be a system of locks in the canals entering into the lake?

Mr. Hall objects on the ground that the evidence elicited is hearsay evidence; the best evidence of that is the plan and scheme and the act of the legislature.

Q. Were there not to be locks in each one of the canals?

A. I understood so, that that was in contemplation in the original plan.

Q. You were asked by Mr. Hunt during this examination if it was not a fact that during high winds the water overflowed some of the lands embraced in the drainage district. Is it not true that by reason of there being no locks in this drainage district that the digging of them canals and not supplying them with locks has been the means of covering them with water, by reason of the winds blowing the waters over the lands?

Mr. Hall objects on the ground that the witness is not capable of giving such testimony; that he is not an engineer and knows nothing about it.

A. To my personal knowledge, I do not know that the water has been blown in, but I believe that it has.

Q. Are you the collector still?

A. Yes, sir; I am.

Q. Have you issued an execution since the Davison case?

A. No, sir; it is not my duty to issue executions; but I will say that I do not know that any execution was issued.

Q. Yes; but you being the collector and furnishing the names to the city attorneys, as you have said, for the purpose of having executions issued, and assisting him in that business, you would be very likely to know and ought to know when they were issued.

A. Yes, sir; of course.

Q. Have you issued any since 1880?

A. No, sir.

Q. Then all attempts made since 1880 for the collection of this tax has been purely persuasive?

A. Yes, sir.

Q. Then nothing has been done by the city of New Orleans looking to a vigorous prosecution of this work beyond what you have stated?

A. No, sir; nothing except in the cases of succession or insolvencies.

Q. When did the city desist from issuing executions?

A. I do not remember the exact date, but after issuing a large

number of them and finding the results to be, as I have
385 stated, the running up of bills of costs and not producing any substantial help to the warrant-holders, in discussing the matter with the various city attorneys it did not seem to be wise or worth while to assume the certainty of costs with so little prospect of collecting it. I will explain that; that any *fi. fa.* issuing upon a tax——

Mr. De Gray objects on the ground that it is not responsive to any question asked.

Q. I ask you again when you arrived at the conclusion, in consultation with the city attorneys, not to issue any more executions?

A. The matter was talked over between myself and Mr. Blanc very seriously.

Q. When? That is the question.

A. I cannot remember the date; when Mr. Blanc was assistant city attorney. When he was there these matters were discussed, and subsequently I had interviews with Mr. Gurley about them, as he was assistant city attorney.

Q. You have spoken of Mr. Van Norden having all the warrants. Is it not true, and did you not know it was true, that all the warrants which Mr. Van Norden got, as fast as he got them he was obliged to pledge them, to borrow money on them, and they were passed out of his control?

A. I know he made pledges of his warrants as rapidly as he got them, and they passed out of his immediate control, but not the ownership of them. He owned the warrants, but they were under a pledge, a great majority of them, and the source of redeeming these warrants was the collection of the taxes.

Q. Is it not true that payments have been so limited after January, 1875, between January, 1875, and June, 1876, the date of the transfer to the city of New Orleans, that Van Norden was so pressed that he disposed of all the warrants?

Mr. Hall objects as being irrelevant.

A. I cannot say absolutely.

Q. Is it not true that it ran along from the time his management went into effect until he concluded the arrangement of 1884 with the city of New Orleans; that he was obliged to pledge his warrants as fast as he got them?

A. Yes, sir; I believe that the great majority of his warrants—he used them for the purpose of raising money on them by hypothecation.

Q. That was the condition of things at the time the business was sold to the city of New Orleans?

A. Yes, sir.

By Mr. HALL:

Q. Do you know anything about the effect of locks in drainage or the digging of canals, from your actual observation and actual personal knowledge, in preventing overflow in the back swamps of the city of New Orleans?

A. No, sir; not from my personal knowledge.

386 Q. This testimony which is offered here and filed in this matter the 12th April, 1888, is very brief. Do I understand you to say that after reading it again—do you desire to modify the testimony you gave in any way, or does the testimony that you have given here today represent the true facts as they existed?

A. Yes, sir; I say that the testimony referred to is given very brief. There were a great many things that I was not examined on.

Q. And, as your testimony stands today, that is the way you desire it to stand?

A. Yes, sir; that is the way I desire it.

J. W. GURLEY, sworn for the defendant, says:

By Mr. HALL:

Q. State substantially the facts as you know them.

A. I was assistant city attorney from November, 1880, to January, 1883, I think—that is, during Mr. Shakespeare's first administration, and by a resolution of the council my term was extended for a few months into Gen. Behan's administration, up to January, 1883. During that time the office of assistant city attorney was a separate office from that of city attorney, and the collection of all the revenue of the city of New Orleans was in charge of the assistant city attorney—that is, the taxes and licenses of every nature.

Q. Were you charged also with the collection of the drainage tax?

A. Yes, sir; including the drainage tax. During the administration of Mayor Shakespeare, after the decision of the Davison case by the supreme court, he issued a proclamation relieving persons from the payment of the drainage tax; but I continued even after that proclamation and used the same efforts to collect the drainage tax that I had before. At that time in all successions, insolvencies, and suits where property was being sold by the sheriff and an intervention was necessary for the city tax I would send down a description of the property to the comptroller's office, with a request that he furnish a statement of all the taxes of every nature due against that property or the owners, whose names I would furnish him. In all such instances the comptroller would include the drainage tax, if any there was due on that property, and I would intervene or oppose for it, as well as for the other taxes. This action by the comptroller was continued up to the date of the mayor's proclamation, after which he would send the certificates without the drainage tax, but I do not think I ever failed to send down and ask him if there was any drainage tax on that property, and in all cases where there was he would send me a statement of it, stating that he had not furnished it at first because he did not suppose it was necessary in consequence of the mayor's proclamation, and in all cases where there was a drainage tax it was prosecuted in like manner with all other taxes, even after the date of the mayor's proclamation.

387 Q. Looking back upon that time, are you aware of any judicious effort which could have been made by you to collect the drainage tax which was not made?

Mr. De Gray objects on the ground that the witness should not be the judge of his own conduct in this case, because that is one of the issues to be determined by the court. The witness may state all he did do and the court say whether it was sufficient or not.

A. Upon several occasions I made extensive examinations into all of the old records and papers of the office relative to taxes, including drainage and everything. I was interested because I was paid in commissions, and I was desirous and made several renewed efforts during the term to rush in everything. I thought I was entitled to them. In addition to this examination of the records, I had conferences with Mr. Blanc, the previous city attorney, as to what efforts could be made to get in all the back taxes, including the drainage tax, outstanding. There is a very large mass of swamp property back of town that had been sold to the city of New Orleans, and a great deal of it had been sold to other persons. It had been advertised at great expense, for the city tax and for the drainage taxes, and there were an immense amount of adjudications to the city of New Orleans, with tremendous bills for advertising and costs. Mr. Blanc's efforts had proven not sufficiently remunerative to encourage a continuance of this kind of efforts, and from an examination he thought it would be a most useless expense to the city, and I concluded that practically there was nothing that could be done to enforce the drainage tax or the city tax against most of the property upon which there were *were* any delinquents of back years.

Cross-examination by Mr. De Gray:

Q. Is it not true, as a matter of fact, that the active effort that you made in collecting the drainage tax consisted in filing an opposition in insolvency cases or oppositions in succession cases to either the accounts of the syndic in insolvency or executors or administrators in succession cases?

A. I brought no direct action on the drainage tax, but I took, in addition to the steps that you have enumerated, the steps which I previously stated.

Q. What were the steps?

A. Filing oppositions where sales were about to be made by the sheriff and debtor and sales between private parties, if the property owed any taxes.

Q. Were there any cases where the drainage tax was due on property to be sold by the sheriff? Were there not very few instances?

A. They were not very numerous; I cannot say how many.

Q. But the bulk of what you did was in insolvencies and successions?

A. Yes, sir; that is, all of the active measures.

Q. Then, in other words, you waited until a man either died

naturally or civilly, and then you asked what was left behind to pay the taxes. Is not that the fact?

388 A. Well, it is a fact that I filed oppositions in this class of cases, and it may be a fact that the city waited or I waited until something was about to be done as to the title of the property before I took any measures.

Q. The three instances where you acted were where there was a sheriff's sale or where a man had died or where he had gone into insolvency. Were not these the three instances in which you undertook to try to collect the drainage tax?

A. In which I took any active measures to collect it.

Q. In other words, you waited until a man was used up and was about to be sold by the sheriff or had died or had gone into insolvency, and then you undertook to see what you could get out of it. Is not that the sum and substance of your active efforts as assistant city attorney?

A. Not so bad as that. I acted in the matter as any prudent man would. I made an examination of the records and saw how the land lay, I may say, in the matter in order to ascertain what active steps could be taken, and after several investigations and examinations of that nature, I concluded that, inasmuch as the tax was upon the property itself and was not going to prescription, there seemed to be no active measure which could be enforced without the expenditure of a larger sum of money than was warranted by the previous results in efforts to collect this tax, and that it was best to do nothing active in them until the title of the property was being passed judicially or until the proceeds of it were about to be divided.

Q. Then the result of your examination was, as I understand you, that the sheriff should seize or that the man should die, either naturally or civilly. Is not — the fact?

A. No, sir. The result of my examination was, as I have above stated, that there was no active measure which I could take without the expenditure of too large a sum of money to warrant these steps or to justify the belief that it was a profit to the city, but where the sheriff had that piece of property which he was about to sell, and the legal effect of the drainage tax was about to be removed from the property, then I took the only active steps known to law to save it. Wherever it was necessary, in my opinion, to save the tax, where active steps were necessary I took them, regardless of what costs might be incurred. Wherever it was not necessary I did not take any steps, because I did not think the tax would warrant the costs.

Q. I understand you to say that you waited until you thought the tax was in danger of being lost before you done anything?

A. You understand me to say that I took no active steps towards the enforcement of the tax, except in these cases where I thought active steps were necessary to save it.

Q. Did you ever collect anything in successions or insolvency cases or from sheriff's sales?

A. Yes, sir; I collected.

Q. Much or little?

A. No, sir; not a great deal, but a great deal of the claims
389 were defeated by the decision in the Davidson case. Before that decision I collected all these taxes very frequently.

Q. Then, in all these cases where you collected them very frequently, the fact that you collected them very frequently did not justify your judgment that the property would not sell for enough to pay them?

A. I distinctly stated that most of the property—when I state most of the property I mean the swamp property in the rear of the city.

Q. Well, a man went into bankruptcy, some men died, and there was property of persons in the rear of the city sold at sheriff's sale all the time you were there?

A. Yes, sir; and a great many of them I had to take a scaling on; there were a great many cases where it was paid *pro rata*.

Q. Where did you get the authority to take a *pro rata* when the act of 1858 says that the tax should be a lien above all the other claims?

A. I do not remember now distinctly about that fact, as to details. I was familiar with it at the time, because I remember distinctly going over all the law with regard to it, but I do remember there was a great many successions absolutely insolvent, and there were grave doubts as to whether the expenses of the last illness and the widow's $1,000 would come in prior to it, and so we had to use our best judgment and efforts in getting at what we could in that way. There were some cases where there was a *pro rata* of the city tax and a *pro rata* of the drainage tax, and they were all homologated by the judgment of the court.

Q. Where there was a *pro rata* judgment and you were not given the drainage tax in full did you appeal?

A. No, sir.

Q. Did you, as city attorney, ever prepare a case with the view of having the question at issue finally determined by the judgment of the Supreme Court of the United States?

A. No, sir; I did not, for a good many reasons. The reasons were that I did not remember of any particular case before the Davison case in which I lost the drainage tax where I thought I ought not to have lost it; therefore, I would not appeal a case of that kind. The Davison case, I thought, was a pretty full and well-argued case before the Supreme Court, and with the amount involved in each particular case that I would have I did not feel justified in going to the Supreme Court on that question.

Q. Then you were controlled with reference to your action in preparing a case for the Supreme Court of the United States by the amount at issue in a single case, and not by the great balance of the taxes uncollected?

A. No, sir; I was controlled by my judgment.

Q. Did you not say you were controlled by the amount?

A. That was one of the elements in the case.

Q. You have been lately connected with the collection of taxes at the city hall?

A. Yes, sir.

390 Q. Have you collected any drainage taxes lately?

A. No, sir.

Q. You were assistant city attorney?

A. I was not charged with the collection of the drainage tax; that is why. I had a special contract for the collection of certain taxes for certain years.

Q. When did your work commence this last time?

A. I think it began on the first day of July, 1887.

Q. There were a great many cases of taxes that passed through your office during that time?

A. Yes, sir.

Q. The taxes for a great many years?

A. Yes, sir; the taxes from 1880 to 1885, inclusive.

Q. The taxes being against a great many individuals?

A. Yes, sir.

Q. Have you any idea of how many?

A. I cannot say from memory.

Q. Well, approximate; did it go into the thousands?

A. It went into the thousands, but I cannot say how many.

Q. What method of proceedings was it in court?

A. No great method of proceedings. The method was similar to what I have described before.

Q. Going in and fixing the tax bills?

A. Yes, sir.

Q. You are, then, familiar with the tax bills filed in the various cases?

A. Yes, sir.

Q. Were any claims made by the city of New Orleans for the drainage tax, or was that left out?

A. There was no claim made for the drainage tax. I had nothing to do with the drainage tax. I had a special contract for the collection of the taxes for specified years.

Q. Do you not know it for a fact that in all the tax bills presented to the courts for collection there is no mention made of the drainage tax in any of them?

A. No, sir; I do not know that.

Q. Then state what you do know.

A. The drainage tax is not put upon the ordinary bill for the city tax, but the certificates, which the comptroller's office had at the time I was in office and has now, so far as I know anything to the contrary, is upon it. In addition to the city tax, there is a column or line for the drainage tax. I have seen a great many of these certificates filed in oppositions and filed in suits in court with the drainage tax carried out on them.

Q. Have you not also seen a great many where the drainage tax does not appear at all?

A. Yes, sir; I have seen a great many oppositions by the city where there was no such certificate, and nothing but the tax bill attached or nothing but the statement of the tax.

Q. Is it not a fact that the city of New Orleans has ceased to make any efforts through the courts to collect any drainage tax?

391 A. Yes, sir; so far as I know she has.

Q. You have been a lawyer how long?

A. Since 1873.

Q. Practicing continually in the courts of Louisiana?

A. Yes, sir.

Q. Is it not the settled jurisprudence of the State of Louisiana that the drainage tax could not any longer be collected?

Mr. Hall objects on the ground that it is an attempt to elicit from the witness an opinion of the law of the State and is improper.

A. That is rather the accepted view.

Q. Is it not true that so far as your observation has gone that in every case where the collection of the drainage tax has come before the courts since the Davison case, the city has failed to collect because of the doctrine there announced?

A. Under the facts embraced in the case, yes, sir. I think there were suits for the drainage tax in other districts recovered.

Q. Yes; in the 4th, and they declared the judgment unconstitutional?

A. Yes, sir.

By Mr. HALL:

Q. Did you have anything to do with resisting the demands by the tax-payers?

A. No, sir; nothing.

By Mr. DE GRAY:

Q. Is it not the settled jurisprudence of this State with regard to the collection of the drainage tax and every tax with which you are familiar that where there is no benefit conferred the court will relieve the tax-payer from paying it?

Mr. Hall objects on the ground that no lawyer, however good, is competent to state what the jurisprudence of the State is; that that must be settled by the court itself.

A. I think that some of the courts leaned in that way—at least for some years since the Davison case.

Q. Do you know any case where the defense was made that the city had abandoned the work, sold the boats, and given up the completion of the drainage system? Do you know of any case where that defense was made that the judgment was given for the drainage tax?

A. No, sir.

Q. Is it not true that where that defense was made the court always relieved the tax-payer from paying the tax, so far as you know?

A. Yes, sir; so far as I know.

By Mr. HUNT:

Q. You spoke of Mr. Blanc?

A. Yes, sir.

392 Q. What kind of an officer was Mr. Blanc in the matter of the collection of taxes?

A. He was the best officer that it has ever been my good fortune to know anything about. He was the most thorough, industrious, painstaking, far-seeing and indefatigable man that I know anything about in that line.

Q. What do you mean by that line?

A. The line of taxation or anything he undertook in the line of his profession, because he gave his whole time and attention, but he was most prominent in tax matters.

Q. I understood you to say that you and Mr. Blanc agreed on one question; you agreed on the commissions for the drainage taxes?

A. We were both of the opinion that the assistant city attorney who collected the tax was entitled to the commission on it.

Q. Did you and Mr. Blanc have every motive and interest that two gentlemen could have to prosecute these suits?

A. Yes, sir.

By Mr. DE GRAY:

Q. Did you — Mr. Blanc ever get any commissions for the collection of the drainage tax?

A. Mr. Blanc got some; I do not remember whether I got some or not; I think I got some, but only a small amount; I know there was difficulty about getting it, because it was claimed by the Van Norden people or by the persons holding the warrants; there was some difficulty about it, but Mr. Blanc had gotten quite a large amount.

Q. Did you not know of a suit that was decided—the case of Rufus Waples against George S. Lacey—touching the right of the city attorney or the assistant city attorney to take any fees for the collection of the drainage tax? Do you not know that the court decided against both Lacey & Waples?

A. I know of that decision, but I also know that both Mr. Blanc and myself did not consider that decision as prohibiting our recovering the commissions on the taxes that were collected through our efforts or where an intervention was necessary.

Q. Notwithstanding the decision of the Supreme Court?

A. We did not understand the decision to be against us on that point.

Q. Notwithstanding the decision of the Supreme Court on that point?

A. Yes, sir.

By Mr. HUNT:

Q. In the cases of administrators or executors in your oppositions, were you not exceedingly successful outside of drainage matters?

Mr. De Gray objects on the ground that it has nothing to do with this case.

A. It is a question a man does not like to answer about himself, but I think I was.

393 After which the case was adjourned by the examiner to Monday, December 3rd, 1888, at 3 o'clock p. m.

NEW ORLEANS, *December 4th*, 1888.

JAMES W. PEAKE
vs.
THE CITY OF NEW ORLEANS. } No. —.

Testimony Resumed on Behalf of the Defendant this Day at 3 o'clock p. m., All of Counsel Being Present.

W. B. WILLETT, being sworn for the defendant, says:

By Mr. HALL:

Q. In 1872 or 1873 what was your business or occupation?
A. I was working on the dredges.
Q. Whose dredges?
A. Mr. Van Norden seemed to be the one I looked to.
Q. There appear to be on this statement from the city hall, marked "amount of drainage warrants exchanged into gold bonds," a large number of gold bonds that were issued to you. Were these bonds which appear there, as a matter of fact, ever issued by you?
A. No, sir; I remember once being sent for, and I went down to the city hall and signed papers, but I do not know what they were; I did not ask.
Q. You did not own the bonds?
A. No, sir.
Q. You had no monied interest in the bonds?
A. No, sir.
Q. But you were engineer on Van Norden's boats at the time?
A. Yes, sir.
Q. Had you any interest in these bonds?
A. No, sir.
Q. For whose account were these bonds issued as a matter of fact?
A. I do not know.
Q. Do you know a Mr. J. W. Pearce or did you know Mr. J. W. Pearce at that time?
A. Well, the name is familiar, but I do not know that I was acquainted with him personally.
Q. Did you know Mr. Shortridge?
A. Yes, sir.
Q. Do you know him intimately?
A. We are half brothers.
Q. What was his occupation at that time?
A. I think he was a clerk of Van Norden.
Q. Was he a man of means?
A. Well, I do not know that; he might have had a little something more than I had.

394 Q. But he was working as clerk?

A. Yes, sir.

Q. Do you know whether his name was used by Van Norden in the issue of these bonds?

A. No, sir.

Q. But you state with regard to these bonds issued in your name that they were not for you or for your account?

A. No, sir.

Q. Were the bonds issued in exchange for the warrants?

A. I do not know anything about them.

Cross-examination by Mr. DE GRAY:

Q. You say you were engineer on the boats?

A. Yes, sir.

Q. How long were you engineer on the boats?

A. Well, I first worked as fireman; I do not know for how long I worked; I expect two or three years—about 3 years.

Q. Were you engineer up to the time of the transfer to the city of New Orleans—were you there in 1876?

A. Yes, sir; I was working around the job.

Q. What boat were you on?

A. I was on several of them. I was on what they call the Noyes, and I was running what they call the derrick.

Q. The apparatus that built the protection levee?

A. Yes, sir; that is, the one that took the dirt from the dredge and put it over from the canal.

Q. Do I understand you to say that you were taken up to the city hall to sign papers?

A. No, sir. I remember going up there one day, and I think it was in the comptroller's office, where Hardy is now, and I believe I signed papers in there that day.

By Mr. HALL:

Q. At whose instance did you go up there?

A. I do not know whether at Van Norden's or whose.

Q. If not Mr. Van Norden, was it or not any of his people?

A. Yes, sir; it was somebody connected with the work; it is a long time ago, and I do not recollect anything about it, only that I worked for him.

Q. You say connected—it was either somebody connected with Van Norden or connected with the business. What do you think?

Mr. De Gray objects.

A. I do not remember who I went with.

Q. Did you ever go up there with anybody unconnected with the business or with Van Norden?

A. I do not think I did.

Q. What business is that you refer to?

A. Going up there and signing some papers. I am speaking of this drainage concern, when they were dredging these canals out.

395 Q. You mean the drainage business?
A. Yes, sir.
Q. You did not have any interest in these bonds one way or the other?
A. No, sir.

ROBERT C. SHORTRIDGE, sworn for defendant, says:

By Mr. HALL:

Q. In 1872 or 1873 what was your occupation or employment?
A. I was clerk under Mr. Van Norden—that is, I was not only a clerk, but I paid off everything—all the dredge-boat hands—and I kept the accounts.
Q. Working for a salary?
A. Yes, sir.
Q. Were you a man of means at that time?
A. Yes, sir; I had more means than I have now.
Q. Were you a man of fortune?
A. No, sir.
Q. It appears on a statement from the city hall marked amount of gold bonds issued in exchange for drainage warrants for work done by the Mississippi & Mexican Gulf Ship Canal Co., a large number of bonds purporting to be issued to you, amounting to a large number of thousands of dollars. Were they issued to you or not?
A. Issued to me as clerk.
Q. For whom?
A. For Mr. Van Norden.
Q. For whose account?
A. For account of the Mississippi & Mexican Gulf Ship Canal Co.
Q. You had no interest in them at all?
A. No, sir.
Q. Do you know Mr. J. W. Pearce?
A. I do.
Q. Is he living?
A. He is dead.
Q. What was his business in 1872 and 1873?
A. He was a broker, of the firm of Matthews & Pearce.
Q. Do you know whether he has done any business for Van Norden and the Mississippi & Mexican Gulf Ship Canal Co.?
A. Yes, sir.
Q. There appears to be likewise issued to him *to* a large number of gold bonds. Do you know for whose account they were issued to him?
A. I do not.
Q. Do you know anything about the bonds issued to W. E. Willett?
A. No, sir.

396 Cross-examination by Mr. De Gray:

Q. What is your business now?

A. I am with the Mechanics' & Traders' Insurance Co.

Q. Do you know the market value of these gold bonds?

A. Yes, sir.

Q. What was the market value of these gold bonds—7 per cent. gold bonds, drainage series—in the year 1876?

Mr. Hall objects to the testimony as irrelevant.

A. I do not know. I can tell you about the highest they were sold for and about the lowest.

Q. Tell us about the highest.

A. I think the highest that they were ever sold was 90 and the lowest was about 26¾.

Q. Did they go up and down or did they come down gradually from the time they first issued to the time the last were issued?

A. It depended altogether how many they put upon the market. The company had a pretty good pay-roll, and sometimes they would have to get the money and they would have to sell some of the bonds—more of them than they could carry—and that would throw the price down.

Q. Who had charge of the sale of these bonds; had you?

A. No, sir; I would take them and go to the city hall, and I think at that time—I am not positive, but I think Mr. Schneider was the person there.

Q. That was the place for the issuance of the bonds?

A. Yes, sir.

Q. But after they were issued to your company, where were they sold—on the streets?

A. Moore, Janny & Hyams at that time, and Mr. Pearce would sell some; the different brokers would sell them.

Q. Were they ever sold at par?

A. Not to my knowledge. I would not state it positively, but not to my knowledge.

Q. But you know of their being sold at as low as 26¾ cents on the dollar?

A. Yes, sir.

Q. Was that early in the work or late in the work?

A. That was after I quit them.

Q. When was that; in what year.

A. Well, I think it was in 1879 or 1880.

Q. As a matter of fact, I will call your attention to the fact that the records disclose that Van Norden and his company transferred all their property to the city of New Orleans in June, 1876. Now, did you quit your connection with this company or Van Norden before or after the transfer?

A. Before.

Q. How long before?

A. The first of January preceding. I was not in the city when

the transfer was made. I was in Philadelphia, at the Centennial.

397 Q. You were out upon this work a great deal, were you not?

A. Yes, sir. I stayed out there from daylight Monday morning until Saturday night.

Q. Were your duties entirely out on the work?

A. Well, I would have to come in and get the money to pay the men. I would come in, and the bonds were sold, or I would come in to go to the city hall, or something.

Q. You are familiar with the plan and design of this work?

A. Yes, sir.

Q. I will ask you whether or not there were not pumping stations——

Mr. Hall objects as leading and on the ground that the witness has not been examined on this branch of the case, and that the counsel for the complainant makes the witness his own; therefore, he must not ask leading questions.

Q. I will ask you whether or not there were pumping stations, according to the plan, to be located at various points along the protection levee on the lake front?

A. Well, there is one at the protection levee and there was another at the London avenue and another one at the People's avenue.

Q. Now, I do not refer to these, but I refer to the pumps that were to be put upon the lake front.

A. Yes, sir. What I — talking about, but over there the protection levee is only some 2,100 feet, and that was to run down to the People's canal.

Q. Have you ever seen this map?

A. I saw a map like that made by the city surveyor, Bell, at the time.

Q. Look at the map marked "Lake Pontchartrain," dated April, 1873, of the lake-shore front, and state whether or not, according to that map, there were to be various pumps stationed between the lake-shore front to throw the water out of the canals into the lake?

A. Yes, sir; there were.

Q. Now, I ask you whether any of these pumps were ever put up there or not? Were they ever put up?

A. No, sir.

Q. No machinery of that kind was ever put up or located there at all.

A. No, sir.

Q. Did the work ever progress far enough upon the lake-shore front to call for the placing of these pumps into position?

A. I am not engineer enough to answer, but I would say "yes," at one end of the protection levee.

Q. As a matter of fact, were they ever placed there?

A. They were not.

Q. At no place?

A. No, sir.

Mr. Hall objects on the ground that the witness is not an expert and not qualified to answer the questions put to him; that the evidence is irrelevant under the bill.

398 JAMES B. GUTHRIE, recalled for further cross-examination.

By Mr. DE GRAY:

Q. Have you got the letter?

A. I have not.

Q. Have you looked for it?

A. No, sir; I have not had time. I was very busy getting up an injunction case, and it occupied every moment of my time today. I came from Judge Monroe's court and was too late, so it goes over until tomorrow.

Q. When can you let us know?

A. I can look for it this afternoon; it is over 5 years since I saw it.

Q. You see if the letter was lost; I want to go into the purport of it.

A. Well, you may.

Q. You spoke of executions; what kind of executions were these that you issued; were they against the person or solely against the property assessed? Or, in other words, did you issue any execution against individuals, seeking to sell any other property or assets of theirs than the property upon which the tax was levied?

A. No, sir; the execution related solely to the property upon which the tax was levied.

Q. Where is this land of which you have spoken and of which you declared that the value of the property was not equal to the assessment—where was it? I find in this evidence of yours that you located it beyond Claiborne street out; is that the location you want to make of it?

A. I had probably in view the land in the first drainage district, beyond Claiborne street and beyond the ridge.

Q. Locate that between the streets?

A. I could not do that without an examination; but between the ridge and the lake there was a large quantity of land that appeared to be mostly under water, or was always so when there was rain; they were not regarded as absolutely valueless.

Q. Now, the land between the ridge and Claiborne street?

A. Well, between the ridge and Claiborne street was the location of most, I think, of the properties upon which an effort was made to collect the assessment by execution; and so far as I know there was not any one of them where there was any bid, excepting that of Mr. Van Norden's agent or himself, who bid the amount of the drainage tax.

Q. I find by an examination of the sheriff's office 240-odd pieces of properties advertised for sale, and I find vastly more than the majority of the property was sold and the tax realized and returned into the city hall. I call your attention to the fact. What do you mean by that proposition—the property was either sold or the execution paid?

A. In every instance, so far as I remember, that payment was made in drainage warrants, coming either directly or indirectly from Mr. Van Norden. There may have been a few—I can-
399 not say—of these sales that were made to other parties, because I remember now in one or two instances where the parties conceived that they could better their title by having it sold for the drainage assessment, and in these instances I think there was a payment of the price in cash, which cash went into the city treasury.

Q. Did Van Norden have anybody to buy it in but Delano?

A. I do not remember all of those that bought.

Q. Did he have anybody there but Delano?

A. I cannot say. Delano bid for a great deal of it, but whether he was the only one or not I cannot positively say.

Q. When Delano bought did not Delano pay the amount of his bid in the sheriff's office, and was not the execution returned satisfied?

A. Yes, sir; the execution should be returned satisfied, but Delano was simply the representative of Van Norden, received the warrants from Van Norden, and made the settlement. The exact minut-æ I do not know, but the money came through me afterwards. In the way of money received through the sheriff my impression is that I receipted to the sheriff for the warrants, taking them as cash. I cannot remember the details of these transactions, if these sales were made. All the sales that I refer to as being made were made subsequent to my being collector. After that, when I was acting as a broker for Mr. Van Norden, these settlements would have been made through the sheriff directly, and I would have very little to do with it, excepting, possibly, the examination of the accounts to ascertain exactly how much in the lump in the way of warrants would be needed.

Q. When the property was sold and bought in by Delano, whether for himself or Van Norden or anybody else, was not the tax in that instance paid, and would it not be so marked and returned to the city hall and the judgment erased from the tax-rolls?

A. Yes, sir; it would be returned as having been paid, and it would, so far as the drainage tax was concerned; we would enter it as paid; but, you see, these sales were made to the extent that they were for the benefit of Van Norden, and when he found that nobody else would buy and pay cash, why he did not feel like buying all the property up and paying drainage warrants for it.

Q. Then he had to stop buying to get out of the dilemma?

JOHN L. NEWMAN, sworn on behalf of defendant, says:

By Mr. SAUNDERS:

Q. You are employed in the city hall by the city of New Orleans?

A. Yes, sir.

Q. What is your occupation there?

A. I am chief clerk of the comptroller's office.

Q. How long have you been in the employ of the city hall?
A. About 4½ years.
Q. Have you had anything to do with the drainage department?
400 A. Yes, sir; it was under my supervision.
Q. Under the supervision of your department?
A. Yes, sir.
Q. Here is a statement of the gold bonds issued to the Mississippi & Mexican Gulf Ship Canal Co. for drainage warrants, already offered in evidence. Will you state whether or not the city of New Orleans has in its possession the warrants which were surrendered for these gold bonds?
A. Yes, sir; there they are, every one of them.
Q. What is the amount of these warrants?
A. $1,375,984.25.

The witness now has here present the warrants, which have been checked by him, with the statement to which he has just referred.

Q. These bonds were issued between what dates?
A. The dates are there; between May, 1872, and December 31, 1874.
Q. Now, there has been offered in evidence a statement of all the drainage warrants issued by the city of New Orleans from —— 1, 1871, to January 1st, 1875. Where are these warrants?
A. All the warrants that I have are here.
Q. Are they or are they not all the warrants issued from 1871 to 1875?
A. I cannot answer that question. Our books have been lost, but I think they are here, every one of them; I have checked them off. They are all here up to this date.
Q. In this bundle of warrants which you produce are the warrants all of the same kind as to wording?
A. No, sir.
Q. Just tell us when they began and where they differ?
A. From June, 1872, to the 31st December, 1874, you will find a different form. There is a difference from May, 1871, to June, 1872, and from June, 1872, to 1874, these latter are another form.
Q. We want a copy of the two forms.
A. Yes, sir; I will furnish it.
Q. What was the kind of warrant that was issued after January 1st, 1875?
A. That is it; I have brought it here.

Defendant offers in evidence the warrant marked O. B. S., ex., Dec'r 6th, 1888.

Q. Now, were these red warrants issued prior to January 1st, 1875?
A. No, sir; there were none issued; I have not seen any of them.
Q. Do you recollect the entire number of warrants from 1871 to the 31 December, 1875?

A. From No. 1 to 499.

Q. Did you go through them and see that you had all the numbers between 1 and 499?

401 A. Yes, sir; I myself went through them.

Q. State if all the warrants from 1 to 499, both included, are here?

A. Yes, sir; they are here.

Q. And they are all of the form that you have already stated?

A. Yes, sir.

Q. They run from July 8th, 1871, to December 1, 1874?

A. Yes, sir.

Q. Now, you furnished a statement here showing the warrants issued after January 1, 1875, which were paid in cash or received for cash in the payment of taxes?

A. Yes, sir.

Q. Has the city or has it not these drainage warrants?

A. I have them right here, with the exception of one. I did not have time to find it in the vaults somewhere. It is for $1,300. I have not had time to find it yet.

Q. But you can find it?

A. Yes, sir; I can.

Q. All the rest you have?

A. Yes, sir.

Witness is here shown document marked O. B. S., ex., Dec'r 4, 1888.

Q. Is that the document which embraces them all?

A. Yes, sir.

Q. The city has in its possession all of the warrants, white or red, which were paid by the city in cash or received by the city for taxes?

A. Yes, sir.

Q. Are these warrants of the same kind?

A. No, sir; there are some white warrants and some red warrants.

Q. The white are the same kind as the white you have spoken of?

A. Yes, sir.

Q. And the red is of the same kind that you have produced?

A. Yes, sir.

Q. Have you any blank forms of the old warrants?

A. No, sir; I have not.

The witness in testifying refers to the white and red warrants received by the city for taxes or paid for in cash by the city.

Q. Now here are some receipts. What are they?

A. They are the receipts of the different warrant-holders in the Mississippi & Mexican Gulf Ship Canal Co. The warrants were surrendered and we gave them a warrant on the treasury for a gold bond. This is the receipt for the warrant.

Q. What is the total amount of the receipts that you have just

presented? How does it correspond with the total amount of the bonds?

402 A. This statement is of the bonds issued to Van Norden and the Mississippi & Mexican Gulf Ship Canal Co.

Mr. Saunders offers in evidence a copy of the two receipts in their separate forms—the printed form and the written form.

In connection with these receipts just offered the defendant further offers the copies of the city ordinances Nos. 1484, 1507, 1554 and 1563, administration series, being the ordinances mentioned in the said receipts.

It is agreed that the defendant may offer in evidence copies certified by the comptroller of the white and red warrants, the copies to be subject to all legal objections that could be urged against the original. The said copies being produced, are respectively marked O. B. S., ex., Dec'r 6th, 1888.

Cross-examination by Mr. De Gray:

Q. Have you all the warrants here that were paid since 1875, and have you also a statement of the entire number of drainage warrants issued? Can you tell us now how many drainage warrants there were out or out now and unpaid?

A. I cannot.

Q. Why not?

A. Because I have not the book; the book has been lost.

Q. But you have the warrants themselves here?

A. I have the warrants here, but I cannot say how much are outstanding now. The books have been lost.

Q. Have you not furnished a statement showing the total number of warrants issued from the first commencement of the issuing of the warrants until the purchase by the city of New Orleans, in June, 1876?

A. I have furnished that statement.

Q. You have furnished a statement of the entire number of the drainage warrants that have ever been issued?

A. No, sir; I have not.

Q. I thought you could tell from what you had here the amount that was out?

A. No, sir; I could not.

By Mr. Saunders:

Q. Will you now examine the statement marked O. B. S., ex., Dec'r 4th, 1888, and state who prepared it?

A. Mr. Jaunet.

Q. What does that statement purport to be?

A. Statement of the drainage certificates issued to the Mississippi & Mexican Gulf Ship Canal Co. in payment for the work done as per surveyor's certificate of November 18th, 1871, to June 4th, 1876, $2,297,734.59.

Q. Does that statement show or not all the drainage certificates ever issued?

A. It does. I think I have all these drainage warrants in my office.

403 Q. All that have been issued?

A. No, sir; the surveyor's certificate for that work.

Q. Upon which the drainage warrants were based?

A. Yes, sir.

Q. Now, if this statement shows the total amount of the certificates issued, and if this other statement of the collections shows the amount of the drainage warrants paid in cash and paid for taxes, can you not tell from the two how many are outstanding?

A. Yes, sir; I can.

Q. Well, tell us how many.

A. I will have to make the calculation, which will leave a balance of $695,109.50 outstanding warrants.

Q. That includes the $320,000 issued on June 3, 1876?

A. Yes, sir.

Q. Now, when were these warrants that are now outstanding issued?

A. I think they were issued subsequent to December 31, 1874.

Q. Here is a statement showing the total amount of the certificates that you have just spoken of. Will you look at that statement and tell us what was the amount of the certificates issued up to December 31, 1874?

A. $1,426,263.67.

Q. Now, can you tell us whether or not all of these drainage warrants have been taken up prior to December 31, 1874?

A. Yes, sir; I think so. In fact, I am positive that they were all taken up. We have $1,375,984.25 funded in bonds, and you will find the difference in what was taken in and paid for taxes and what was paid by the city for them in cash.

Q. Then, all now outstanding were issued subsequent to January 1st, 1875?

A. Yes, sir.

LOUIS LAROQUE, sworn on behalf of the defendant, says:

By Mr. SAUNDERS:

Q. You are employed by the city of New Orleans, are you not?

A. I was appointed book-keeper of the bureau of drainage.

Q. How long have you been connected with the drainage department?

A. 20 years.

Q. Here is a statement, marked O. B. S., ex., Dec. 4, 1888, of the collections of the warrants in cash and a statement of the disbursements of the drainage tax by the city of New Orleans. Will you look at it and state who prepared it?

A. The collections, so much, were all prepared by Mr. Jaunet, taken from the books of the office.

Q. And the balance was prepared by whom?

A. I took off the statement showing the certificates received from drainage taxes.

Q. Is there anything else in that which you made?

A. I checked them all off to see if they were correct, and also a statement of the warrants taken in by the warrants, cash paid to the bondholders for the warrants.

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Q. That is, you made a statement of these warrants which were paid in cash to the holders of them?

A. Yes, sir.

Q. From whence were these statements drawn?

A. From the books in the comptroller's office of the city of New Orleans, under which the bureau is placed.

Q. Has the city of New Orleans any vouchers for these documents?

A. Has the city any vouchers?

Q. Yes.

A. She has the warrants that she paid and the warrants that she received for the drainage taxes.

Q. Have you checked off these warrants?

A. Yes, sir.

Q. And the statements are correct?

A. Yes, sir; they are.

Q. Now, here is a statement of the assessments in the fourth drainage district, marked O. B. S., ex., Dec'r 4, 1888, and another statement in detail of these assessments. Will you state who prepared this statement?

A. I prepared them myself.

Q. From what?

A. From the books in the office of the bureau of drainage.

Q. Are they correct?

A. Yes, sir.

Q. There is also a statement of the collection made by the city of New Orleans and the board of commissioners. Did you prepare that?

A. Except that collection part which Mr. Jaunet made. I took them from him, but the collections from 1876, in cash and warrants, I got from this report of Mr. Jaunet.

Q. Prior to 1876 did you make that statement?

A. Prior to 1871.

Q. Who made the statement of the collections from 1871 to 1876?

A. Mr. Jaunet made the statement. He made the additions and everything.

Q. You made a statement of the collections prior to 1871?

A. Yes, sir; they were taken from the books.

Q. Are they correct?

A. Yes, sir; correct according to the books—according to the statements made in the minutes.

Q. Mr. De Gray has offered in evidence a statement of the total amount of the assessments in the four drainage districts which differs a little from yours. Now, in the first district Mr. De Gray's statement shows $705,000 and some cents.

A. Yes, sir.

Q. Were you aware of the discrepancy between Mr. De Gray's statement and your own?

A. Yes, sir; I was.

405 Q. Did you make any effort to see which was correct?

A. Yes, sir, I did. We looked at the original rolls placed in court in 1872 and previously, and I think that mine came out correct.

Q. Now, in the second district there is also a discrepancy between the statement offered by Mr. De Gray and that now offered by you. Were you aware of that discrepancy?

A. I was.

Q. Did you make any effort to find out which was correct, yours or his?

A. Well, the only effort that I could make was to look. I got that from the minutes of the board of commissioners of the second drainage district made in 1867 by William T. Mayo, the secretary at that time.

Q. What is the cause of the discrepancy between Mr. De Gray's statement and yours?

A. I cannot tell.

Witness, being shown the statement in detail of the assessments in the second drainage district, and being shown the report of the department of public accounts for September, 1872, states that the cause of the discrepancy between his report and that of the report of the department of public accounts is that in the department of public accounts two instalments, the 9th and 10th instalments, were not deducted as they should have been, and on his statement they are deducted.

WITNESS: I will also state to you how I got at the result in the first drainage district. In the minutes of the board of commissioners of the first drainage district in 1867 there is a detailed tabular statement showing the assessment in four sections of the first drainage district separately. This statement was gotten up by the board of commissioners, as the minutes state, to know what they had to work on and what amount of money had been collected from 1860 to 1867, during the war, when it was out of their hands. That tabular statement I have made a copy of and it is produced here; that is where I got it.

Q. Now, in the fourth drainage district?

A. Yes, sir; the roll assessment is made in the plan and tax.

Q. Was that statement of the assessment correct?

A. Yes, sir; also the statement of the second drainage district was taken from the minutes where they required a statement to be made, and that statement was made by Mr. Mayo at the time, in 1867, showing the original assessment, the amount collected, etc.

Cross-examination by Mr. DE GRAY:

Q. How do you account for the fact that the drainage rolls, as homologated by the court in the first drainage district in 1874, put the assessment and the court rendered judgment for the amount of

the assessment against the city of New Orleans for the sum of $231,000 for the last 9 instalments, while on the list it is $271,000. Can you account for it?

406 A. Unless it is some section of the first drainage district where the streets were not included.

Q. Are they or not included in the rolls as they were homologated?

A. Yes, sir; that is the only way I know it could be.

Q. You have furnished no statement showing the exact amount for which judgments are rendered against the city of New Orleans.

A. From the office?

Q. Yes; in the first drainage district.

A. No exact amount.

Q. No; you furnished no statement from the office showing the amount of the judgments against the city of New Orleans based upon the rolls in the first drainage district; or, in other words, in this statement you have made is a statement of the assessment.

A. Yes, sir.

Q. But you have furnished no statement showing to what extent that assessment was homologated by the court, have you?

A. No, sir.

By Mr. HALL:

Q. You do not mean to say that you made a list of the judgments from the judgments themselves?

A. No, sir.

By Mr. DE GRAY:

Q. You do not know what the amount of the judgment was rendered against the city of New Orleans in the first drainage district?

A. No, sir.

Witness, NICHOLAS J. HOEY, being duly sworn as a witness and examined for defendants by Mr. Saunders:

Q. Where were you born?

A. In New Orleans.

—. How old are you?

A. I was born in 1836.

Q. What has been your business?

A. Auctioneer and real-estate agent.

Q. How long have you been engaged in that business?

A. Since 1851.

Q. You are familiar with the value and locations of the property of this city, I believe?

A. Yes, sir.

Q. In your business as auctioneer and real-estate agent you have had occasion, I presume, to sell and rent property all over the city?

A. Yes, sir.

Q. Are you familiar with the city maps?

A. I am.

Q. And I suppose you are familiar with the character of the lands in the different portions of the city?

407 A. I am, sir.

Q. Along the Metairie ridge, northeast of the fair grounds and within the said limits, is that property rural or urban—that is, is it laid out in lots or used by squatters or for other purposes or by agriculturists?

A. There are detached portions of it used as urban property, but the main part of it is entirely rural or suburb.

Q. Is the property out there sold by the acre, lot or square?

A. From the subdivisions, the original subdivisions, of the land until you proceed down below Hopkins' place it is always recited as lots and squares; but nevertheless, it is used in a rural manner.

Q. And for what purpose is the land out there used?

A. Dairies and gardens.

Q. Now, about how much per acre is cultivable land along the Metairie ridge worth?

A. From what point?

Q. Well, say from the point we are speaking about.

A. From the fair grounds out to People's Avenue canal there would be quite a variation. I would have to strike an average from the fair grounds, or ridge immediately at the fair grounds. It is somewhat better, and between that and the Pontchartrain railroad it decreases very much in value. At the Hopkins plantation the land is higher again, and between that and the People's Avenue canal it decreases again—the valuation diminishes. There is quite much of a slope or ascent and descent.

Q. Where is the Pontchartrain railroad you refer to—on what street?

A. Elysian Fields, continuing from the river down below the town of Milneburg.

Q. Where is the Hopkins plantation you have spoken of?

A. On the east side—on both sides of Bayou Gentilly; on each side of Elysian Fields and up.

Q. What is the cultivable land on an average worth along Metairie ridge per acre?

A. The cultivable land?

Q. Yes; the habitable land?

By the MASTER: Do you mean by your question, Mr. Saunders, the land which is under cultivation or might be cultivated?

Q. What proportion of land along the Metairie ridge that is susceptible of cultivation is actually cultivated or used for gardening?

A. Very little now, sir.

Q. Well, how much?

A. Not twenty per cent. of it.

By Mr. DE GRAY:

Q. Well, was it ever cultivated? You say now.

A. Yes, sir; perhaps twice as much was cultivated in the past twenty-five or thirty years.

408 Direct examination resumed by Mr. SAUNDERS:

Q. From your knowledge of that locality, what do you estimate the value per acre of lands out there that are susceptible of cultivation?

A. I put it at $50 per acre.

Q. What is the value of the lands north of the Bayou Gentilly and between that and Lake Pontchartrain?

A. There is no value to it at all.

Q. It has no value?

A. No, sir.

Q. What is the character of the land?

A. Swamp.

Q. The land I refer to is the land on this map extending between Bayou St. John on the west, People's Avenue canal on the east, Lake Pontchartrain on the north, and the Metairie — on the south. You say that land has no value?

A. Yes, sir; with the exception of the cultivable portion bordering Gentilly?

Q. That portion you have estimated at $50 per acre?

A. Yes, sir; and with the exception also of the urban property surrounding Bayou St. John and surrounding Milneburg, on the lake, the balance, I hold, is worthless.

Q. What amount of property is there at Milneburg that has any value?

A. A dozen squares altogether that represents some value?

Q. What value do you suppose those squares have?

A. You mean the buildings?

Q. And the ground.

A. Just as they are, the buildings and all, it would take me but a moment to state that, because I know it very well. I should take as an outside value about $60,000.

Q. The whole of Milneburg?

A. Yes, sir; one dozen squares.

Q. The whole of Milneburg?

A. Yes, sir.

Q. One dozen squares?

A. Yes, sir.

Q. Spanish fort is situated at the end of Bayou St. John. Look at those squares and tell me what value they have, No. 1565?

A. None at all.

Q. Indicate the squares at Spanish fort or at the mouth of Bayou St. John that have any value.

A. I see that the streets on this map are not named here. The lake route is not put there.

Q. Well, how many squares do you suppose have any value there?

A. I would extend it to an area of 10 squares there that have a value.

Q. And what would you consider the average value of those squares to be?

409 A. Including the fort? Well, that puzzles me more than Milneburg.

Q. Well, the ten squares outside of the fort.

A. Well, the average value of those squares would not reach $400 a square.

Q. Will you look again on that map here and tell me what is the character of the land included between Metairie ridge on the north and continuation of Claiborne street on the southeast, People's Avenue canal on the east, Marigny avenue on the southwest? What is the value of that land?

A. There is a slight belt running on both sides of Marigny avenue and Elysian Fields avenue that has some value, but the most of the interior portion is worthless.

Q. How many squares do you suppose there are that have any value?

A. I would say this: That the value might be considered to obtain from the belt of two squares along Elysian Fields, Marigny avenue, and extending up towards Bayou Gentilly.

Q. How many squares do you suppose there are that have any value?

A. I will say this: That three-quarters of the triangle comprised by Marigny avenue, Gentilly and Elysian Fields—three-quarters of it have some commercial value.

Q. About how much commercial value have they? What is the value of the squares out there? What would they average?

A. About a mill a square foot.

Q. What is the value of the land contained in the irregular quadrilateral between Gentilly road, People's avenue and the continuation of Claiborne street and Elysian Fields St.?

A. About ½ of that area is worthless.

Q. What is the value of the other half?

A. One-half of the remainder is worth about one mill a square foot, and I would say that the other half would be worth as much as $50 per acre. There is very little difference between them.

Q. What is the value contained in the triangle bounded by People's avenue, Florida walk and the continuation of Claiborne street?

A. It has no value at all.

Q. That is swamp, ain't it?

A. No; it is not a swamp exactly.

Q. Well, what is it?

A. It is a chapar-al. The timber has been hewn, and it has had its second and third growth of timber.

Q. Is it above or below high-water mark?

A. It is below. It is below high-water mark of the lake; far below.

Q. Will you look at the lands contained in the quadrilateral bounded by Lafayette avenue on the west, Florida walk on the north, Ursulines convent on the east, and St. David street on the

south? It is marked St. David street on the map, and you
410 can call that Claiborne street. What is the value of the land contained in that quadrilateral?

A. I think that about one-eighth of that has a commercial value of, say, three hundred dollars a square.

Q. And the balance of it?

A. The balance of it I consider worthless.

By Mr. SANSUM, master:

Q. How many acres are there to a square?

A. There are generally two acres to the square.

By Mr. SAUNDERS:

Q. What is the value of that irregular piece of land bounded by Florida walk on the north, Fisherman's Avenue canal on the east, the United States barracks on the south, and Claiborne street?

A. There is no value to that land.

Q. Look at this piece of land. Here is a quadrilateral in the fourth drainage district, bounded by Howell's property on the west, Claiborne street on the north, the United States hospital on the east, the Good Children street on the south. What is the value of that land?

A. There is about twenty-five squares laid out there, including the slaughter-house property.

Q. No; without that.

A. I think I would put them at a high average when I put the 25 squares at $400 a square.

Q. Do you think they would bring that at a forced sale?

A. I am giving you the top of the market on it, because that is a garden district.

By Mr. DE GRAY:

Q. And the land is under cultivation?

A. Yes, sir; it is; a great deal of it.

Q. About $400 a square would be the value of good gardening property or land in that locality?

A. Yes, sir.

By Mr. SAUNDERS:

Q. What is the value that you put upon this piece of land—by Florida walk on the north, Stoddard Howell's property on the east Claiborne street on the south, and Ursulines convent on the west?

A. It is not laid out in squares. I consider it worthless.

Q. What is the value of the land east of Stoddard Howell's property north of Claiborne street?

A. I don't consider it of any value.

Q. What do you consider the value of the Ursulines Convent property, north of Claiborne street and towards the swamps?

A. Well, that has some value, because they have paid more attention to it than the surrounding gardeners.

Q. That portion beyond Claiborne street?

411 A. I would not put it down at more than some of those lands above. I put it down for a short distance from Claiborne street.

They go back to Florida walk, don't they?

A. Yes.

Q. They don't go beyond it?

A. No.

A. Well, I will put it down at half a mill per square foot.

Q. For the whole of it?

A. Yes, sir.

Q. And that land contained between Lafayette avenue on the west, Claiborne street on the north, Ursulines Convent property on the east, and Good Children or St. Claude street on the south, what is the value of that?

A. That is all city property; that is all built on.

Q. Are you sure of that?

A. The greater portion of it is.

Q. That is city property?

A. Yes, sir.

By Mr. DE GRAY:

Q. Well, that has a value?

A. Yes; there are buildings on it, and all that sort of things. It is not presumed that I should set a value on that without going to examine the different species of property.

By Mr. SAUNDERS:

Q. Do you know how far back it is built?

A. It is built as far back as Claiborne street.

Q. How far eastward does it run—to Lafayette avenue?

A. Yes, sir.

Q. Now, let us go back to the third drainage district again. What is the value of the property contained in the space between Florida walk on the north, Lafayette avenue on the east—say for six squares south of Florida avenue?

A. There is no value to it.

Q. It contains the squares numbering from 1061 to 1067 on the south line and 1487 to 1497 on the north line?

A. Yes, sir.

Q. What is the character of the land on property south of the portion we have just mentioned, bounded on the north by that piece, on the east by Lafayette avenue, on the south by Claiborne, and on the west by Elysian Fields?

A. I should say that there was one-quarter of that worth $300 per square—say $300 per square—and the remainder of it is worthless.

Q. Would that be the valuation of the property along Elysian Fields and Claiborne streets?

A. That is the portion I reserved. That is the portion I gave a value to, between Elysian Fields, and the portion along Lafayette avenue I don't consider of any value.

Q. I now call your attention to another tract of land in
412 the third district, bounded by Marigny avenue on the north, Metairie ridge on the northwest, St. Bernard avenue on the west, and bounded on the south, say, by a line running along the four line- of squares from the junction of Marigny avenue and Elysian Fields street, containing the squares from No. 1200 to 1209.

A. I consider one-third of that property is worth about $500 a square, and the other two-thirds is worth about $300.

Q. What is the value that you put upon this piece of ground bounded on the west by Bayou St. John, on the north by Marigny avenue, on the east by Bayou Gentilly and the Metairie ridge?

A. I hold that to be worth nothing.

Q. What is the value of the land bounded on the east by the Bayou St. John, on the south by the Metairie ridge, on the west by the Orleans tail-race, and extending north as far as they are numbered on this map?

A. From the ridge?

Q. Yes, sir.

A. Well, there you have the Allard plantation. That is on the books of the assessment. You have the city park, and that is of some value.

Q. How high is that land back there?

A. It runs back there, you see.

Q. I am asking you of that portion. What is the value of that part of the Allard place from the dotted lines on this map which represents the boundary of Metairie ridge?

A. I don't think the dotted lines on this map goes back far enough. The dotted lines should go back three or four squares further.

Q. How wide is the Metairie there?

A. Eight or ten squares fully. He has the dotted lines on this map that takes in only two squares.

Q. How wide does the Metairie ridge extend on the north side of Bayou Sauvage—how many squares?

A. I should say that it extends fully four hundred yards; that would be four squares without the intervening street, which would then make it 3 squares, taking out the streets. I am satisfied that it extends a distance of four squares or 400 yards.

Q. Now, then, when you get into the swamp north of Bayou Sauvage, at the distance you estimated of four hundred yards, what is the value of the land beyond that?

A. It has no value at all.

Q. Now, here is Monroe avenue.

A. That is four squares from Bayou Sauvage.

Q. Do you recollect where it is?

A. Yes, sir; I think you can limit that; you can put the Monroe Avenue property on a limit.

Q. Is the southern limit of that property worth anything?

A. The northern limit of that property is worth something; the southern limit I consider worthless.

413 Q. Is that the valuation for all of the land between the New canal and Bayou St. John?

A. Yes, sir.

Q. What is the value of the land between Monroe avenue and Bayou Sauvage or Metairie ridge, the average value of those lands that would bring us up to the cemeteries?

A. East of the cemeteries the value is very apportionate. I will put an average on it, say, a mill to the square foot.

Q. Now, on the land bounded on the north by Monroe avenue, on the east by Bayou St. John, on the west by the New canal, and on the south by the Metairie ridge—what would you value that at?

A. The cemeteries are included in that, and I can't answer anything about that. I am no expert in valuing cemetery property.

Q. About how many squares do the cemeteries cover?

A. I will have to give it to you very roughly.

By Mr. SANSUM, master:

Q. Do the best you can.

A. Yes, sir.

By Mr. SAUNDERS:

Q. Well, about how many?

A. I should say about forty squares.

Q. And the balance of the area you estimate at one mill a square foot?

A. Yes, sir.

Q. You don't put any valuation on the cemeteries at all?

A. No, sir.

Q. There is another tract of land that I want to call your attention to; it is bounded on the north by the Metairie ridge, on the east by the Orleans canal or tail-race, on the south by Carondelet Avenue canal, and on the west by the New canal; what valuation do you put on that ground?

A. That is all on the assessment-roll.

By Mr. DE GRAY:

Q. Strike an average on it?

A. Canal street runs through it; it varies much. The shell road goes through it.

By Mr. SAUNDERS:

Q. What would you value those squares?

A. Some of those squares are worth from ten to twelve hundred dollars per square, and others are not worth more than two or three hundred dollars.

Q. What is the value of the squares on Canal street?

A. Those I rate as high as $1,200 a square.

Q. What is the value of the squares—say, two or three squares from Canal street back towards the New canal?

A. Between $200 and $300 a square.

414 Q. What is the value of the square or property 2 or 3 squares north of Canal street?

A. They go back in like proportion as they approach the Orleans tail-race, and they acquire, perhaps, a slighter value as they approach the Metairie ridge on the west.

Q. How many squares do you estimate to be of the value of $200 or $300 in this area bounded by Canal street, Carondelet avenue, and the New canal?

A. About twenty of them I would put at the least valuation.

Q. What valuation?

A. From $200 to $300—that is, the interior 20 sqs.

Q. How many are there on the north side of Canal street and between that and the Orleans canal that you would put at from $200 to $300 per square?

A. No more than the like number.

Q. What is the value of the lands south of Canal street, and between Carondelet Avenue canal, Hagan Avenue canal and the New canal.

A. The Canal Street fronts are entirely in the assessment records; nearly the whole of that is built on; there is a great deal of it on Common street; the interior squares, I don't suppose that to be worth any more or as much, and I would put them at about $200 a square as an outside limit.

Q. How many squares in that area do you estimate as low as $200?

A. 25 squares.

Q. What is the value of the interior squares?

A. That is the limited price.

Q. The squares in the area bounded by Hagan Avenue canal, Canal street, Broad street, and the New canal, what value do you place on those squares?

A. You are getting right into the assessment district.

Q. You know the character of the country there?

A. Yes, sir; I have property for sale there now.

Q. What would be a fair average on that property? I am not speaking of the city property, but the interior; put an average on it.

A. The squares off of Canal street I would average them as high as $500, and on Canal street they would reach fully up to from $1,200 to $1,500.

Q. What are they worth on and near the New canal, from Broad street to Hagan Avenue canal, still following that line?

A. I would not put them at more than $100 more than those I have just valued in the interior. I would value them at $600.

Q. Now, say, in the second drainage district, what is the value of the property bounded by the westward and northward line in the second drainage district on this map of the New canal, the line of squares indicated by the numbers 495, 618 and 616?

A. You want it in a round sum for those squares?

Q. Yes.

A. $250 for those squares, each.

415 Q. When you used the word "square" what dimensions do you understand them to be—about how many feet?

A. 300 to 320 feet; some more and some less.

(Witness, being referred to the second drainage district, states that it was all taxable property up to Claiborne street; beyond that it is speculative property.)

By Mr. DE GRAY:

Q. What do you call speculative property?

A. That portion beyond Claiborne street, along Washington street, in the territory I have described, is of a speculative value. I would place a value on the land at from $200 to $250 per square.

Q. The area that you have been speaking of has a speculative value? Now, what is the value of the squares off of Washington street?

A. I would not put them at more than $100 per *share*.

Q. What area is that on the boundaries of this map?

A. On Galvez street, within two squares of Carrollton avenue, six squares from Claiborne street.

Q. That is in the second drainage district, six squares west of Claiborne street, all included in this map, between Galvez street?

A. Yes, sir.

Q. Six squares from Claiborne street and Toledano street, from the New canal you consider to be of what value?

A. I say the interior portion has a value of not more than $100 and on Washington street $250.

Cross-examination by Mr. DE GRAY:

Q. Well, now, Mr. Hoey, I want to see if you can condense this matter so as to make it intelligible. Is not the result of your explanation that you have thus far given that all the lands outside of those which you have described as of no value is valuable lands?

A. Yes, sir.

Q. How is the present valuation of lands; how does it compare in the city of New Orleans with the valuation of the lands at the end of the war, or, say, the years 1870 or 1871—is it higher or lower?

A. You mean taking it generally?

Q. Well, yes.

A. It is far lower.

Q. What date would you regard as the date of the highest point of value of lands?

A. In the spring of 1867.

Q. And then it decreased?

A. Yes, sir.

Q. Take from 1870, 1871 and 1872, has it been decreasing since?

A. It decreased from 1872 up to 1878 to an alarming decree.

Q. What percentage did it decrease? I am not speaking
416 of city property, but of lands; we are speaking of lands in the territory of New Orleans.

A. I can't make such a statement as that as a whole; suburban lands are a different thing.

Q. Well, what do you say of that?

A. The decrease has been fully 75 per cent.

Q. Since the year 1867?

A. Since 1867 up to 1877 and 1878.

Q. What has been the decrease in suburban lands since 1871 or 1872?

A. Fully that, sir; not from the low point of that date; I should say about 50 per cent. from the low point of that date. There has been a gradual decrease since 1867.

Q. But from 1871 and 1872 up to 1877 and 1878?

A. They were not regarded as of any value at all then.

By Mr. SAUNDERS:

Q. You mean in regard to the suburban lands?

A. Yes, sir.

Cross-examination resumed by Mr. DE GRAY:

Q. How does the value compare today with the value of 1871 and 1872; is it not all less?

A. Yes, sir; the value today is not more than about 30 per cent. of what it was then.

Q. From 1871 and 1872?

A. Yes, sir. I will take that back and say up to 1870.

Q. But I am talking of from 1871.

A. 1871 and 1872, call it nothing; they were of no value.

Q. My question is, how does the value of the suburban lands now compare with value of the lands in 1871 and 1872?

A. They haven't depreciated in value from 1871 and 1872.

By Mr. SANSUM, master:

Q. As I understand, they are worth as much today as they were worth then?

A. In 1871 and 1872; yes, sir.

Cross-examination resumed by Mr. DE GRAY:

Q. You are acquainted with Mr. George L. Bright's preperty, the Oakland course?

A. Yes, sir.

Q. You know that property?

A. Yes, sir.

Q. What was the value of that piece of property in 1871 and 1872?

A. I don't think I could put a value on it.

Q. Take the value in 1867.

A. I suppose that property then would be considered to be worth from $50,000 to $60,000.

417 Q. And between 1867 and 1872 it depreciated to nothing?

A. I don't say it depreciated to nothing, but it had no market. The depreciation was so marked as not to give me any guide to put a valuation on it.

Q. What is the value of the property now?

A. Well, I should say it would be worth now about $20,000.

Q. Do you know what the Howard Cemetery people paid for the Metairie race-course?

A. No, sir; I do not.

Q. Do you remember when they bought it?

A. I would not like to be precise about that.

Q. It was about 1871 or 1872—along there?

A. Yes, sir; somewhere along there.

Q. What is the character of the land you have described as being of no value in this map? Is it not land that is undrained and subject to overflow—not cleared; also subject to the waters flooding up onto it from the lake?

A. Yes, sir.

Q. Are not those the elements that render it valueless?

A. Not entirely.

Q. Well, how are they effected?

A. There is no communication with those lands.

Q. How does the rainfall and the overflow from the lake affect the lands?

A. That depreciates its value.

Q. That not only covers it with water, but prevents access to it?

A. Yes, sir; and shuts off communication.

Q. Now, suppose this case—suppose that land was all drained and protected; for instance, in Holland there are great portions of land—I have been informed through my readings that some part of that country was under water entirely, and dykes have been built around it, and the land shore being drained and rendered valuable; suppose there was a system of that description that surrounded this property, and it was drained and protected from overflow and communication was rendered easy between the various portions, and access to it was made easy, would or not this land then become valuable and be valuable?

A. I answer immediately the lands would become valuable.

Q. The land naturally is a rich land; the soil is rich, isn't —?

A. Yes, sir.

Q. It is a virgin soil and inexhaustible soil, which has not been cultivated—not much of it?

A. It is rich soil.

Q. Have you ever been over any of the land?

A. Yes, sir; I have been over nearly the whole of it.

Q. You know it from a personal examination?

A. Yes, sir.

Q. Do you know what the cactus is or the species of cactus that grows on this land—did you ever see it?

A. I don't know of any cactus growing on it; there is what is called the palm leaf or lantanie.

418 Q. On all this land which you have described there grows a plant called lanta-ie?

A. Yes, sir. I don't suppose there is any part of it where there is any missing on it.

Q. And that is always found upon rich soil?

A. Rich in some respects; it is good for snipe, I know. I don't really know about that. I am not enough of an agriculturist to state that the latanie plant is any indication of rich land.

Q. Do you know where the station called Frenier is, on the Jackson railroad?

A. Yes, sir; I do.

Q. The next station is De Sair and the next this way, nearest New Orleans, is La Branch, and the next is Kenner?

A. Yes, sir.

Q. Do you know whether or not there has been a considerable settlement along the line of the railroad there at these various stations I have mentioned?

A. Yes, sir; there was at one time a great settlement.

Q. What is the business of the people at those places, generally?

A. I never stopped there. I was a passer-by. I had no interest with them, but I know they are gardeners.

Q. I will ask you if you know what the value of the lands are in that locality for gardening purposes?

A. I do not. I never sold any land there and I never had anybody applying to me for any.

Q. Not any one?

A. No, sir.

Q. What is the character of the lands there as compared with the land in the rear of the city here; is it not now similar low land—alluvial land?

A. I think the cultivated lands around Frenier had never been cleared, that there were less stumps in it; it is the same class of land but easier worked. I think there were some plains in it.

By the MASTER:

Q. More like a prairie, then?

A. Yes, sir.

Cross-examination resumed by Mr. DE GRAY:

Q. Have they not drained their lands considerably there; each man for himself altogether—each man for himself?

A. That was my last observation. I don't know what it is today.

Q. Those were rich lands for gardening purposes?

A. Yes, sir.

Q. And the general character of the land is similar to the general character of the lands in the rear of the city?

A. Yes, sir.

Q. Suppose this land was all drained and protected; that

419 there was a system devised which would drain and protect all of this land in the rear portion of the city of New Orleans and surroundings on the lake, so as to make it habitable and capable of cultivation and for gardening purposes, what, in your judgment, would be the value of such lands?

A. I really can't answer that. I can answer that by simply saying that it would attract population at once, and in the course of time those lands would assume a value commensurate with their immense benefit to the city and would increase greatly in value instead of laying in waste, as it has been for the last twenty or thirty odd years. I could say this: That if those lands around there were well drained and protected they would easily retain a working population of a hundred thousand and still not be crowded. If such a matter as that could be obtained you could get $1,500 per acre for it, but it would require some time for that and with a great deal of assurance that these same calamities would not happen again.

Q. In Holland they have such protection there where they have a wash from the sea. The water comes from the sea and they have had no difficulty in taking care of it.

A. Yes, sir; they may be colonial people, and they are like crabs on a rock and not like the people here, who would get up and git. Hollanders are fixtures.

Q. Suppose that all of that land was drained and protected, would not the entire lake-shore front be desirable for summer-residence property a great deal more than it is now?

A. Now there are none.

Q. Now there is nobody there, but suppose that was all protected and drained or dry land, with streets laid out, made, and formed so that access was made easy, what then?

A. I should say that it would then be a very good place for summer residences.

Redirect examination by Mr. SAUNDERS:

Q. Mr. De Gray has been examining you as to the possible value of the lands in the back portion of the city for agricultural and gardening purposes as if the lands in the city of New Orleans were drained. Now, can you tell us whether all the lands in the rear of the city suitable for gardening purposes have been taken up for this purpose?

A. Yes, sir; all that is suitable for that purpose in its present existing condition has been taken up.

Q. Well, has all the land suitable for this purpose been taken up along the Metairie ridge?

A. Yes, sir.

Q. Do you know if all the lands suitable for those purposes immediately below the city of New Orleans have been taken up?

A. Yes, sir.

Q. Are you sure of that?

A. All that are suitable under the present existing condition.

420 Q. I am speaking about the lands below the city of New Orleans—below the barracks.

A. Oh, I can't tell you about the Terre aux Bœufs lands. I know it was a great vegetable and sugar country, potatoes.

Q. You don't know about that?

A. No, sir; it has been many years since I have been down at St. Bernard. All the squares down in the lower part of the city which could be used for gardening purposes are now enclosed and used for gardens. I know that wherever I have them for sale or rent they are of such a nature from communication and other reasons so as to attract those people, and they will center there and use and cultivate them.

By the MASTER:

Q. You mean they are in demand?

A. Yes, sir.

Recross-examination by Mr. DE GRAY:

Q. You say you rent some squares for gardening purposes. Now, what do they rent for per square?

A. I spoke of the renting business as incidental. I don't suppose I have had more than two or three such cases as that.

Q. What do they rent for?

A. About $5.00 per acre per annum.

Q. How high have you sold any squares that have been used for gardening purposes?

A. The whole of my testimony has been based upon sales.

Q. Take a large tract and give an average. I ask you how high you have sold them; what has been the highest price?

A. For a square?

Q. Yes.

A. About $400.

Q. In gardening districts?

A. Yes, sir; of course; out on the Metairie ridge or the Gentilly road, where there is a place of an arpent or two front and about eight or ten in depth—that is to say, about 20 arpents or so—the price would decrease materially if there was a lack of communication.

Q. The price of all lands largely depend- on the facility of communication?

A. Yes, sir.

Q. The better and more easy the communication the higher the value?

A. Yes, sir.

Q. And where that communication is good the prices have been as high as $400 per square?

A. Yes, sir.

Q. If the communication was good they are generally good, judg-

ing from the fact that you have already stated that $200 to $400 a square to be a fair price for all lands suitable for agricultural purposes and for gardening purposes?

421 A. Well, if the conditions were alike, of course.

Q. Yes.

A. Yes, sir.

Q. I find by examination of titles of sale that suburban lands sold in 1871 and 1872 very much higher than they do at present. Now, is not that a fact?

A. Not in many cases; not very many cases.

Q. Was it not generally so?

A. No, sir.

Q. When you take the land along Broad street and Hagan avenue didn't it sell a great deal higher in 1872 than it does now?

A. Well, in 1872. I told you about the commencement of 1872 about that perfect blank. There was a perfect blank from 1872 to about 1878. Prices commenced dropping in 1867 and it dropped up to about 1872, and then there was a perfect blank after that until about 1877 or 1878.

Q. How does the value of the lands in the suburban district in 1878 compare with the value of the lands at the present time—was it not much higher in 1878 than it is now?

A. Well, generally speaking, I think it was higher in 1878 than it is now.

Q. How much higher?

A. 15 to 20 per cent. higher, about.

Q. Hasn't it depreciated since 1876?

A. It depreciated from 1872.

Q. From 1876 to the present time hasn't it depreciated?

A. No, sir. There was a reaction that commenced in 1877 and in 1878. It continued up to 1884 and 1885. Since that there has been a depreciation again.

Q. There has been a depreciation of from 15 to 20 per cent.?

A. Yes, sir.

Q. Now, what would you call on the map of the city of New Orleans suburban property?

A. You want to run a line all the way up.

Q. Would you call it beyond Metairie ridge or between Metairie ridge and the lake?

A. I don't call that any property at all; it is worthless.

Q. It is land; it is something.

A. I should call suburban property—say, take from Claiborne street, in the fourth drainage district, and its continuation up to, say, St. Bernard avenue and re-entering Claiborne street above.

By Mr. SAUNDERS:

Q. Do you think that if all of the land within the limits of the city of New Orleans were drained and protected from overflow that could be sold for gardening purposes at the rate of $200 per acre? What would be the value of suburban lands per acre—the lands suitable for gardening and agricultural purposes?

A. If they were put on the market now?

Q. Yes; if they were drained and put on the market.

A. It is a question of the attraction of population. I be-
422 lieve I made the remark before that if such a state of affairs were to occur the population would be attracted here and I believe they would be sold for that.

Q. They would not be sold for that until the population was attracted to it—in other words, the value would be conjectural?

A. Yes, sir.

Witness, W. I. HODGSON, being duly sworn as a witness for defendants and examined by Mr. Saunders:

Q. How old are you?

A. I am over 25 years of age.

Q. How long have you been in the auctioneer business in the city of New Orleans?

A. Thirty-one years.

Q. You are a real-estate agent, broker, and auctioneer in city?

A. Yes, sir; we handle property all over the city, private and public estates.

Q. You do one of the largest business- in that line in this city?

A. I—I don't know about that.

Q. You know that you do one of the largest business- in this city?

A. I do a large business.

Q. You are acquainted with the different localities within the limits of the city of New Orleans?

A. Yes, sir. I ought to. I have been running around there for the last 40 years.

Q. Look at this map marked "O. B. S. master, February 1st, 1889," and state what value you put upon the lands in the locality bounded by the Lake Pontchartrain on the north, People's Avenue canal on the east, the Metairie ridge on the south, Bayou St. John on the west, and on the south by Metairie ridge and Marigny avenue?

A. I don't put any value on them, because it is all swamp lands—swamp and marsh.

Q. Is there any sale for lands in that locality?

A. No, sir.

Q. What is the value of the lands on the Metairie ridge as it is marked off on this map, commencing in the rear of the fair grounds and extending to the People's Avenue canal?

A. You mean south of Gentilly road?

Q. Right in here, as I have designated it. You see, here is the Metairie ridge running along on that map, represented by those pencil marks; right on the Metairie ridge, commencing in the rear of the fair grounds and extending to the People's Avenue canal. What do you estimate the value of all that land along that ridge between Marigny avenue and People's Avenue canal?

A. I don't place any value upon it. I would not pay taxes on it if you would give it to me. I would not pay the taxes on it for it.

It is so hard to get in there, and then you might get in there and collect a little moss. I have often been back in that locality.

423 You have to go in the marsh and swamp. You might raise a little vegetables and collect some moss, but the expense would be too great to get in there. I would not pay the taxes on it if you would give it to me.

Q. You know the Hopkins place?

A. I know of it, but I have never been there.

Q. On the L. & N. road and Elysian Fields street, what is the value of that land?

A. That is on the Metairie ridge. I can't tell you about that. I don't know. I believe there are several places on it on that ridge; habitations on it and little gardens.

Q. What demand is there for property along the Metairie ridge?

A. None at all.

Q. Now, take the property bounded on the north by Metairie ridge, on the west by People's Avenue canal, on the southwest by the straight mark or continuation of Claiborne street, and on the northwest by Marigny avenue.

A. It is the same kind of land as the other.

Q. What value do you put on it?

A. None. I would not pay taxes on it if you would give me the titles.

Q. Is there any demand for it in this market?

A. Not that I have ever heard of.

Q. Now, let us look at this triangular strip of land in the northwest, bounded by the continuation of Claiborne street, on the east by the People's Avenue canal, and on the south by Florida walk.

A. It is the same kind of land.

Q. Has it any value?

A. No, sir.

Q. Is it inhabited?

A. I can't tell you that. There may be some huts on it.

Q. Is it high or low?

A. It is all low land.

(The property in regard to which he has been testifying is in the third drainage district.)

Q. Now, let us go into the fourth drainage district, bounded on the north by Florida walk, on the east by the Ursulines Convent property, on the south by St. David street or Claiborne street, and on the west by Lafayette avenue.

A. I see that you have no streets on this map. When you get three or four squares back of Good Children street you leave high land, and then all that back there is marsh and swamp land.

Q. What demand is there for that land?

A. None, sir.

Q. There is no demand for it?

A. None.

Q. You consider that three or four streets back of Good Children

street has no value, after you come to three or four streets back of Good Children street?

424 A. Yes, sir; four or five streets after that point you strike an open swamp.

Q. Wet or dry?

A. Wet.

Q. High or low land?

A. Well, I should judge that it was low.

Q. What do you know about it?

A. I have been in there. I have hunted in there.

Q. Now, also in the fourth drainage district, bounded by Florida walk on the north, the United States property on the east, and the Stoddard Howell property on the west, back of the barracks.

A. When you get back in there it is all marsh and swamp lands.

Q. How far back of St. Claude street is the property worth anything?

A. I don't think it is worth anything more than one or two squares back. That land ceases to have any value not over two squares of the old Mexican Gulf railroad. I don't think anybody or any sensible man would take that property for taxes. It is all cut up; to a certain distance fenced up and used for gardening purposes. There is no value attached to it at all.

Q. So that in the fourth drainage district your opinion is that in the upper portion, after four squares back of St. Claude street, the property ceases to have any value, and the lower portion, about two squares back of the old Mexican Gulf railroad or St. Claude street, the property ceases to have any value?

A. Yes, sir. There are some farms back there on the portion where it is higher, where it has been taken care of.

Q. What is the value of those farms per acre?

A. I don't know; I haven't sold any.

Q. Now, in the fourth drainage district, Mr. Hodgson, there is some property not divided on this map by squares, bounded on the north by Florida walk, on the east by Stoddard Howell's property, and on the west by the Ursulines Convent property. What is the valuation of that property?

A. Back of the railroad, you mean?

Q. Yes; back of St. Claude street.

A. I would not place any value on it after you get two or three squares back of the railroad or St. Claude street.

Q. So that your opinion is that in the whole of the fourth drainage district, an average of four or five squares back of the railroad, that the property has no value?

A. Yes, sir; it is not worth the taxes on it.

Q. Now, in the third drainage district, examine this piece of property bounded on the north by Florida walk, on the east by Lafayette avenue, on the northwest by a straight line there marked, the continuation of Claiborne street, and on the west by Elysian Fields; what, in your opinion, is the value of the property?

A. Well, sir, I don't think there are any buildings of any extent on it after you get one or two squares away from Good Children

street, and it then extends out to the lake. After you get to
425 one or two squares of Elysian Fields, straight back in there, there are some high lands in there, but it is not built on it to any extent except shanties; that is all that is on it. I don't think there are any —, either.

Q. There are none at all?

A. That is pretty good land when you get back there. Well, we will take from Claiborne street, and then there are no buildings on it. The dividing line, say, is Claiborne street. Claiborne street down there is like the dividing line uptown. When you get back of Claiborne in there there is nothing of any consequence. It is all open land, mostly marsh, not swamp; there are trees on it; that is almost under water. I sold some squares down in there in the succession of Mrs. Gaines last year, right on the railroad, for $5.00 a square, and the fellow said afterward that he would like to get his money back; it was three feet under water.

Q. Right on the railroad?

A. Right on the Pontchartrain railroad, going down Elysian Fields street, I sold some squares on the right side of it for $5.00 a square.

Q. So that in your opinion the lands contained in that portion bounded by Florida walk, Lafayette avenue, St. David or Claiborne street, and Elysian Fields street has little value?

A. It is all marsh land. There are some trees on it. It is not what you call swamp land. It is marsh and swamp mixed; a great deal has no trees on it.

Q. What would be its value per square?

A. I would not put any value on it. I would not have it. It could be drained into the lake; then there would be a value on it; there is no doubt about that.

Q. Now, in the first drainage district, contained in the piece bounded by Elysian Fields street on the east, Claiborne or St. David street on the south, St. Bernard avenue on the west, and Marigny avenue on the north.

A. All around in here is pretty good land—that is, all along St. Bernard avenue and Claiborne street. There are some nice little farms along here at Gentilly; nice dairies and farms, except right along the Pontchartrain railroad; all the rest of that is good land, with houses and dairies on it.

Q. How much do you suppose it is worth?

A. I don't know what value to place on that; some squares are worth more and some less. Some are worth $5.00, others are worth $8.00, and some lots for $100 and others $10. Mrs. Gaines had a lot of that property; some in good high land and some low, and some of it near the railroad is all marsh and swamp.

Q. Well, how many squares do you estimate to be swamp land in that portion just indicated?

A. I can't tell you that exactly now. I would have to go down and look at it so as to be certain. There are some 3 or 4 squares where there are buildings on them back there on the railroad, but over here it is not as high, and in here it is rich land, with farms

and dairies, and around here there are nice houses; along and around Claiborne street there are the nicest kinds of property;
426 there is high land along here. I haven't been over this land for the last 5, 6, 7, or 8 years.

Q. Well, now, take this track back of the fair grounds, bounded by Marigny avenue on the north, St. Bernard avenue on the east, Metairie ridge on the south, and Bayou St. John on the west.

A. That is pretty much all marsh.

Q. Well, has it any value?

A. Well, no, except near Esplanade street there is some high land. The old Ludling place and the jockey club is good land, but as — go away back from the fair grounds you go into marsh lands. The fair grounds is good. That is a good, fine piece of property, but all the property back of the fair grounds is pretty much all swamp.

Q. Now, on the west side of Bayou St. John, look at the land bounded on the east by the Bayou St. John, on the south by the Metairie ridge, on the west by the Orleans tail-race. What is the value of that land?

A. There is the city park in there. That is good land, but the back of the city park is all marsh and swamp.

Q. As far as what west?

A. As far as the New canal.

Q. So that in your opinion all the land between the New canal and the Bayou St. John and back of the city park is low land?

A. Low land; marsh and swamp. Back of the work-house there and back of the city park clear to the lake is all low land; swamp and marsh.

Cross-examination by Mr. DE GRAY:

Q. Where are the cemeteries in there?

A. The cemeteries are all in there.

(Witness points out the land indicated on the map by the squares from 690 to 692 and 651 to 654 and says:)

Right in that vicinity the cemeteries are, and some of it runs on the other side of Canal street. There is the Firemen's cemetery on this side and one next to that, and the other side is the Firemen's, the Greenwood, the potters' field, and you have the Odd Fellows' rest and the Jews' cemeteries.

Q. How many squares do the cemeteries cover?

A. I don't know.

Q. The cemeteries are all high land?

A. Yes, sir; pretty high land.

Q. What is that worth?

A. I don't know what the cemeteries are worth.

Q. They are all high lots?

A. Yes, sir; I suppose on ordinary lots.

Q. Take a whole square of the cemeteries.

A. If it was not a cemetery—open land—it would be worth $500 a square.

Q. But as a cemetery?

427 A. Well, now, that is another thing. I have a lot that cost me $150 and it measures five and a half feet by eleven feet.

Q. For the naked ground?

A. Yes, sir.

Redirect examination by Mr. SAUNDERS:

Q. What is the character of the land in that irregular piece of ground bounded by the Metairie ridge on the north, by the Bayou St. John on the east, by Hagan avenue on the south, and by Canal on the west?

A. That is pretty good land.

Q. Is it high or low?

A. It is what is called high land; no marsh nor swamp. If it was properly ditched and drained it would be valuable land, and could be used for the purpose of building residences. There are many houses in there.

Q. What kind?

A. Frame residences; and there are fine houses on Canal street.

Q. Now, northeast of Canal street, what is the character of the land there?

A. It is pretty good; all good land.

Q. What is the character of the land in the piece bounded by Canal street on the northeast, by the New canal on the northwest, and by Hagan Avenue canal on the west?

A. That is all pretty good land.

Q. Is the property in there valuable?

A. Yes, sir; good land, and worth about $400 or $500 a square.

Q. Now, in the second drainage district, what is the value of the land between the New canal and Jackson railroad, where the boundary of the second drainage district is marked on this map, going as far as the Jackson railroad depot?

A. After you get back of Claiborne street then it is all low land. The depot is down at Magnolia street. That is not the place where the depot is at all as it is marked on this map. You are making me come here and correct your map.

Q. Well, now, that property is there back of Claiborne street, in that portion between the New canal and the Melpomene canal, how is that land?

A. I say that up to Claiborne street it is all right, but back of Claiborne street it is all low land, all the way up to Melpomene street. I have a lot of property in there, and I can't get $20 a square for it—it belongs to Dr. Wood—and some on Washington avenue.

Q. Look at the squares west of the Melpomene canal and back of Claiborne street.

A. It is the same style of land, all marsh and swamp.

Q. What is the character of the land in the second drainage district between Claiborne street and the river?

A. That is very good.

428 Q. I want to direct your attention to that portion of the city of New Orleans which is between or divided by Toledano street and by the Upper protection levee, on the upper line of the city and the river, and I will call your attention to that part of the city by sections. In the first place, let us take that portion of the area which I have just mentioned, which is bounded on the north by Lake Pontchartrain, New Orleans or New canal on the east, the Upper protection levee on the west, and the Jackson railroad on the south.

A. Well, there is a little high land in there; for instance, there is George L. Bright's park in there; that is high land, and the Metairie cemetery is in there; that is high land, and there is the Metairie ridge, going out or where Dr. Beard used to live, and Holmes, and there is Bonnable's place and milk dairies.

Q. Well, what is the character of the bulk of that land.

A. It is swamp; the Oakland is all high land, but there is marsh all around it, but the Metairie ridge and Metairie cemetery and the land running through Camp Parapet to the river is all high land, with nice farms there; but the bulk of the land is swamp.

Q. And has it any value?

A. It has some value for the wood that is on it, because there is high land to bring it out, and it it not like the other low land, where you have to bring it out in boats.

Q. What do you estimate the swamp lands to be worth there?

A. There is some high land around there, and you can get carts to it to haul out the wood.

Q. Well, give your best judgment.

A. $5.00 an acre, about; the wood land, not marsh.

Q. And the bulk of the land in there is what?

A. When you get near the lake it is marsh.

Q. How many acres do you think, in your best judgment, there is high and valuable in that part?

A. I have no idea. I would have to take and measure it.

Q. What is the character of the land between the Jackson railroad, Toledano street, Claiborne street, and the Foucher property?

A. That is all very low land, swamp; there is some little high land back, at about Marengo street, Constantinople street, near Claiborne street; but when you cross Claiborne street in there the ground is very low and it has no timber on it.

Q. What is the character of the rear portion of the Foucher property?

A. When you get about 3,000 feet from St. Charles avenue it is very low land.

Q. A little over a half of a mile, then?

A. It is very low land then.

Q. You say for half of a mile of the avenue is very good land?

A. Well, two-thirds of a mile is good land; back of that is Metairie ridge. I have ridden through that last year.

429 Recross-examination by Mr. DE GRAY:

Q. Is not the result of your examination—to shorten the thing—that all the lands in the city of New Orleans except those that you have designated as low lands are high lands and valuable lands? You have mentioned all about the low lands. Now, outside of the low lands, you have mentioned, for instance, those towards the river and the like, of which Mr. Saunders has not asked you. That is all valuable land?

A. It is land that has a value to it, but I would not call it valuable land.

Q. Is it not, the most of it, built upon?

A. Yes, sir; and under cultivation and fenced in.

Q. Let me ask you what the Metairie Cemetery people paid for the Metairie race-course when they turned it into a cemetery?

A. I believe it was $75,000.

Q. Do you know how many acres there was in it?

A. No, sir.

Q. Was it as large or larger than the Oakland race-course?

A. Larger, I think.

Q. Do you remember when they bought it?

A. Away back in 1870, 1873, 1874, or 1875—somewhere along there. Mr. Duke and Charley Howard were the principal men who bought it. I attended the races there 35 or 40 years ago.

Q. A great deal of this land that you have spoken of—you stated that it could be rendered valuable by drainage?

A. Yes, sir.

Q. Is not that land low, due to the fact that it is not drained and protected from overflow?

A. Yes, sir.

Q. What is the character of the soil? Is it not rich alluvial soil?

A. Yes, sir; very.

Q. And for gardening, how would it do?

A. First rate.

Q. If it were drained?

A. If it were drained. Some of that soil back there is a little tough and it wants a little sand to it.

Q. It is what is called virgin soil?

A. Yes, sir; it is very rich.

Q. What has been the depreciation in property in the rear of the city since the year 1876?

A. Whereabouts?

Q. Take along Broad street, along Hagan avenue.

A. There has been some depreciation.

Q. Haven't these numerous overflows that have occurred over these lands on account of the want of proper drainage—haven't they affected the value of that property very much?

A. Yes, sir; entirely—some 50 per cent.

Q. How would the value of the property in 1876 compare with the value of the property in 1871, 1875, and 1873?

430 A. Where do you mean?

Q. In the rear portion of the city, which I have just called your attention to.

A. In 1871, and for about four years, there had been a great interest manifested back there in property; it was unusually high between Canal street and the New basin back of Broad street. The property sold high around there from 1868 to 1871, when I think that was the year, when Warmouth was nominated for governor, the bottom was knocked out.

Q. And after 1871?

A. After 1871 it depreciated a good deal and recovered a little, and it has been pretty much the same since.

Q. You say it was higher than now in 1871.

A. 40 to 50 per cent. higher; not all——

Q. But on an average?

A. There is some property back there that never was worth much, back of the marine hospital, for instance; that is very low land; it is not filled or ditched.

Q. It has no value, then, because it is not drained and subject to overflows?

A. Yes, sir; I have a square for sale back there which belongs to George W. Hynson, that he bought at the time of the Edgerton swindle, when bonds were issued to build a railroad from here to Mobile, and Hynson bought up some land back there and he gave $18,000 for a square of ground, and he wants to sell it for $1,000; it is 5 or 6 squares on this side of Carrollton avenue; I tried to sell it recently, but couldn't do it.

Q. Have you sold any lands within late years for gardening purposes in the city of New Orleans, or do you know of the sale of any gardens?

A. Nothing to any extent. I sold some lots last year down the bayou; there were some vacant squares outside of the fair grounds.

Q. And they sold for what?

A. All the way from $25 to $200 a lot.

By Mr. SANSUM, master:

Q. What is the size of the lots?

A. Ordinarily of 30 by 120 feet.

Recross-examination by Mr. DE GRAY:

Q. It was not put up in garden shape?

A. It was, and had been for a good many years; the heirs got a quarreling and sold it.

Q. You sold it at auction?

A. Yes, sir.

Redirect examination by Mr. SAUNDERS:

Q. I understand you to say that from 1867 to 1871 the property in the rear of the city that was habitable or cultivatable had a high value?

431 A. Yes, sir; near Canal street.

Q. Was that the case with the property in the fourth and third drainage districts?

A. No, sir; the only places where there was any interest manifested or where the land rose up in price was always between here and the cemeteries on Canal street and vicinity, where there was communication with Canal street, or near Canal street, back there.

Q. Take the property generally in the rear of the city, in the third and fourth drainage districts, and back of Claiborne street, in the first and second drainage districts, what was the value of such property?

A. I don't think there was any value to it then—no more than it has now. That kind of property has never had any value in this market. There is a little piece of dry land where the Louisiana race-couse used to be—where the railroad leaves Elysian Fields. The people had grand stands there. That is high land in there, but back of it is all marsh. I don't think that is very valuable now.

Q. All the property in the rear of the city—generally all that you call low; all the property, say, back of Claiborne street—how does it compare with the value of the property through the entire length of the city of New Orleans?

A. I don't think there has been any change in it.

Q. Has there been any demand for that property?

A. Not to my knowledge.

Recross-examination by Mr. DE GRAY:

Q. What is the value of gardening property, property capable of raising vegetables—market truck? What is the average value per square for that within the city?

A. I don't know. It is very diversified. It depends upon where it is. If it is accessible to the market, where you can get to it, and is not subject to overflows, where you can reach it so as to bring it to the market, and where you can raise a crop, and a man is sure that it would not be overflowed, you can buy squares in the third district, used for cultivating, for $500 to $600 per square. In the rear of Carrollton or on Carrollton avenue, that will do — cultivation, you can buy land for that purpose for $800 to $1,000 back from the river—not immediately on the front; and if you step over on the parapet levee, where they have put up a protection levee, you can buy land there from $50 to $100 an acre, and there — two acres in a square.

Q. That is within or inside of the protection levee?

A. Outside of the protection levee. On the inside of the protection levee it would be higher. It would cost you from $800 to $1,000 anywhere back in Carrollton—good high lands.

Q. That is good, high lands?

A. It is pretty good back there—some eight or ten squares back from the river. Some portions of it is high lands—the principal

part. There is high land in Carrollton—some part of Car-
432 rollton; back 14 streets; 28 streets from the river, and then you strike a swamp. The town don't appear to run like any other city in America.

By Mr. SAUNDERS:

Q. What has been the character of the demands for lands in this city during the past sixteen years?

A. You mean lands in the rear of the city?

Q. Lands that have some value?

A. Not a great deal.

Q. There has not been a great deal?

A. No, sir; a party may have come to see me now and then to sell a farm who has one for sale.

Q. So there has not been any demand in the city?

A. No, sir.

Q. So, then, the demand has been quick and very easily satisfied?

A. Yes, sir.

JOSEPH DESPOSITO recalled as a witness for defendant, and examined by Mr. Saunders:

Q. You have already testified in this case, I believe?

A. I suppose so. I presume this is the same case.

Q. I think that you have stated that you had been connected with the State tax collector's office in the upper districts for a good many years?

A. Yes, sir; for the past twelve years.

Q. Well, can you tell us what has been the collectibility of the State taxes in the upper districts of New Orleans, above New Orleans up to Carrollton, north of St. Charles street, between St. Charles street and the swamps?

A. Well, in the immediate vicinity of St. Charles street the collections have been passable, but as you go further in the rear the collections there has been very few, in very few instances where there was any taxes due between, say, from Dryades to Rampart.

Q. On the line of what street?

A. Louisiana avenue or somewhere thereabouts. In fact, we never have collected any taxes there; with the exception of where there was improved property did we collect any taxes. Under acts No. 82 of 1884 and No. 92 of 1882 we sold some property for taxes.

Q. Then your opinion is that the State taxes have not been collectible between Dryades street and the swamps?

A. Yes, sir.

Q. Why has that been the case?

A. Above Louisiana avenue, the sixth district—the sixth and seventh districts—I would presume that those parties who owned the property—I don't know positively, but the presumption is rather that they did not think the property was really worth it. In fact, I have made calculations in regard to that matter, and what attracted my attention to it was there was an attempt made by the Western Land

Immigration Company to buy up all this land. They pur-
433 chased a large batch of stuff that had been previously purchased by O. Dean Grotto. He had purchased that stuff, I presume, to some extent, and settled for it under this act No. 92 of 1882. He would purchase batches of it, and sometimes there would be a lot of it at the same figures, and he turned it over in bulk to those people, the Western Land Immigration Company.

Mr. De Gray, solicitor for complainant, objects to the evidence on the ground that it is verbal testimony of transactions that are in writing. It is inadmissible, and is not the best evidence.

And I found very often that the taxes on the bill—I noticed usually that they would ask me to figure it up and see what it amounted to, interest, &c., and I did figure it up, some of it. Whenever taxes were due from 1880 to 1888, inclusive, that amount due on the property exceeded the amount of assessment, notwithstanding the previous purchase price or the previous taxes due.

Q. In considering the taxes due prior to 1880 what effort has the State made to collect the back taxes?

A. It has made two; first under act No. 98 of 1882, wherein the property so sold was required to bring the amount of all the taxes, cost, and interest due prior to 1880; that was the first attempt; and in that manner the State of Louisiana acquired a lot of real estate of the sort we have been speaking about, and then she made another effort under another act, act No. 82 of 1884, and it provided in that act the giving of an absolute title to whoever would purchase it, and the purchaser to be the last and highest bidder; that was the second effort that was made.

Q. What amount has the State realized under those efforts?

A. Well, frankly speaking, nothing; the State has suffered a loss considerably.

Q. What has been the cost of those efforts?

A. I believe—I don't really know any figures, but I know that there was an act of appropriation passed through the legislature to pay the printing bills, which amounted to $75,000.

Q. For advertising?

A. Yes, sir; this property that we are speaking of we all know that with but very few exceptions in the effort made to collect the taxes success was rare, as a geneaal rule—that is, in regard always to the property we are speaking of, of which we have reference to in that rear portion of the city.

Q. You state that the advertising alone amounted to $75,000?

A. Yes, sir; about that.

A. E. AUBERTIN, being duly sworn as a witness for defendants and examined by Mr. Saunders:

Q. You are employed in the office of the civil sheriff of the parish of Orleans?

A. Yes, sir.

Q. For how long have you been employed there?

A. Going on seventeen years.

Q. Can you tell us anything in regard to whether separate books were kept for the drainage *fi. fa.'s*?

A. Yes, sir; there were separate books kept for them.

Q. What is your employment in the sheriff's office?

A. I am deputy clerk now.

Q. You had charge of the books?

A. Yes, sir.

Q. Have you examined the books containing the drainage *fi. fa.'s* and advertisements recently?

A. Yes, sir; last week.

Q. Have you prepared any statement of what they show?

A. That is the statement which you have right there in your hands.

Q. That is the statement which I have in my hands?

A. Yes, sir.

Q. Is this statement correct?

A. To the best of my knowledge, yes, sir; two of us worked on it—Mr. Parker and I.

Q. It shows the number of writs of *fi. fa.'s* issued?

A. Yes, sir.

Q. Does it show the number of sales advertised?

A. Yes, sir.

Q. And the number of sales that took place?

A. Yes, sir.

Q. And it shows the amount of cash paid by the city of New Orleans?

A. Yes, sir.

Q. And it shows the number of adjudications to the different persons and the amounts realized?

A. Yes, sir.

Q. And it also shows the number of writs advertised and settled without sale?

A. Yes, sir.

Q. And the number of writs where the property was not sold for want of bidders?

A. Yes, sir.

Q. Also the number of writs stayed by judicial proceedings and the number of writs stayed by order of the city attorney?

A. Yes, sir.

Q. Well, was it correct?

A. Yes, sir.

Q. According to the books?

A. Yes, sir.

Q. Now, I noticed here that you have certain sales stated to have been sold to *bona fide* purchasers and other sales to the persons whose names are given. For instance, Norcross, Bowers, Cox, Harvey, and Delano. What do you mean by "*bona fide* purchasers"?

A. Well, some of those people who bought the property for themselves to make use of it for their own benefit; they were *bona fide* purchasers, and the others I don't think a transfer ever took place.

435 Q. You mean that the *bona fide* purchasers were those outside of the ones such as I have named?

A. Yes, sir.

Q. You don't know whether they were any better than those I have named—Bowers, Norcross, Cox, Harvey, Delano, and so forth?

A. No, sir.

Q. You simply use the term *bona fide* to contradistinguish these from the others?

A. Yes, sir.

Mr. Saunders, solicitor for defendant, offers in evidence the statement referred to by the witness and marked "O. B. S., master, February 9th, 1889."

By Mr. HUNT:

Q. You are now a deputy clerk? You have not always been a deputy clerk?

A. Yes, sir.

Q. What particular part have you?

A. I have charge of the book, and I have been for 15 years and a half a tax clerk.

Q. Is your knowledge familiar with the tax-payers, city and State taxes?

A. With the city and State taxes, but not much about drainage taxes.

Q. Have you ever been or are you often called upon in tax examinations?

A. I am. I attend to the sheriff's matters before the passing of title—all the tax business.

By Mr. SAUNDERS:

Q. I see a statement in here of "judicial costs paid by the city of New Orleans to the civil sheriff, nine hundred and fifty-nine dollars and fifty cents." Does that include the cost of advertising?

A. No, sir; actual cash. In some of them there was a copy of the *fi. fa.*, which was $2.00, and notice of seizure, $2.50; some of them amounted to $4.50; that was for the recording, where they were recorded.

Q. Then that does not include the cost of advertising?

A. No, sir; not the cost of printing.

Q. What was the average cost of advertising these sales?

A. It was according to how many squares there were advertised.

Q. Well, what was the average cost?

A. I suppose you could average them at about $9.00.

By Mr. SANSUM:

Q. $9.00 for what?

A. For an advertisement; two or three takes the whole page.

436 Cross-examination by Mr. DE GRAY:

Q. I want to know what you mean by a *bona fide* purchaser?

A. A man who buys a piece of property and follows all the requirements of law, pays his taxes, and tries to collect his revenues from it.

Q. Were not every one of these pieces of property that were bought at the sheriff's sales—did not the parties pay the amount that it was sold for to the sheriff?

A. I was not present when the sheriff was paid or when the amount was paid to the city; whatever transaction the parties had I don't know anything about; I can't tell you; I can't tell you whether there was any exchange of receipts; I did not make the settlements.

Q. Well, your books show that every sale that was made that the amount of money was paid for which the property was bid in?

A. Yes, sir.

Q. Was not such a purchaser a man who buys the property and pays his money for it; is he not a *bona fide* purchaser?

A. Well, sir, I will have to make a double answer to that. If a man buys a piece of property and conforms with the law and pays all his taxes, yes; but if he don't take possession and conform with the law, I don't think he is.

Q. Did they not take possession?

A. No, sir; only in few instances.

Q. Did you not make a deed or procès verbal of sale to these persons who purchased the property?

A. I don't know whether it was a deed or procès verbal that was given; that was in another department.

Q. If a sale is made and the man pays his money for it, you would not consider him a *bona fide* purchaser at the time?

A. At the time; but if he did not comply with the law afterwards—if he did not pay all the city and State taxes due on this property and did not take charge of it.

Q. Could you make a deed to him or deed him the property and turn it over to him, if he didn't pay all the city and State taxes due on it?

A. The sheriff is ordered to sell the property under that special writ, and he done it; further than that he has nothing to do.

Q. Is it not a rule of—in the State of Louisiana, especially in reference to a sheriff's sale, when the sheriff gives a complete title the purchaser is given a procès verbal of the sale by the sheriff?

A. They didn't give any.

Q. Well, you don't know whether a title has been given, do you?

A. If a title had been given there would have been a mark or something on the books to show that.

Q. Did you see any marks or anything to show on the books that any of those parties whom you have classed as *bona fide* purchasers received any title to their purchase?

A. No, sir.

437 Q. Then in all of these sales where these people paid their money, where the sheriff sold the property, and the people paid their money for the property, the sale was made and the people paid the money, and you have no evidence on the books or anywhere to show that they were *bona fide* sales or anything *bona fide* attached to them at all?

A. Well, in the face of it, it looks like a *bona fide* sale, but in my mind I don't think so.

Q. Then it is a matter of judgment with you whether these were *bona fide* sales or not?

A. I consider them *bona fide* sales where they paid the city and State taxes due on them, and that they would not do.

Q. Then, no matter how much money a man pays for property, as long as he doesn't pay the city and State taxes due on it, it is not a *bona fide* sale?

A. Yes, sir; I believe so.

Q. And out of all the sales that took place you have only marked eight as not being *bona fide* sales?

A. Yes, sir.

Q. And in classing them or in picking them out you have been guided by the process or upon the idea just stated by you?

A. Yes, sir.

Q. How many *fi. fa.'s* were issued in 1875?

A. I have given a list of them from 1875 to 1879.

Q. Well, how many were issued in 1879?

A. I don't know that.

Q. Look at that statement which I now hand you and state whether it is in your handwriting.

(Witness examines the same.)

A. Yes, sir; it is.

Q. Is that a correct statement of all the properties that were advertised by the sheriff?

A. Yes, sir; because I remember it is. That is in my own handwriting, made out of the same book.

Q. Will you say that there were over 1,500 executions that were issued, and the properties that were advertised for sale were 265, I think, or about that number?

A. Yes, sir; or 269.

Q. Why was it that no more was advertised?

A. I can't answer that.

Q. Isn't it a fact that the sheriff failed to find the parties or their representatives against whom the writs ran?

A. Yes, sir; a good many of them.

Q. Isn't it true that he failed to find all those except the ones that were advertised?

A. No, sir; oh, no.

Q. Why didn't he advertise the others?

A. I can't answer that question. Mr. Wurzberger had charge of the office at that time.

438 Mr. De Gray, solicitor for complainants, states that at a later date he will offer in evidence the document referred to by the witness and marked for identification "O. B. S., master, February 9th, 1889."

Q. Now, Mr. Aubertin, from January 3rd, 1876, to May 3rd, 1879, were there any writs issued or were there any properties advertised for sale?

A. Properties were advertised for sale; there may have been nothing in month of March, but I think——

Q. I ask you if there were any properties advertised for sale between January 3rd, 1876, and May 3rd, 1879?

A. Yes, sir.

Q. Where was it? I now show you statement, which purports to be a statement of all the property you have offered for sale, and I ask you to look at that statement and say whether there was a single piece of property advertised for sale between January 3rd, 1876, and May 3rd, 1879. Just take it and look over it.

By the MASTER:

Q. Now, Mr. De Gray wants you to look over this statement or paper and say whether there are any sales indicated upon it between dates mentioned—January 3rd, 1876, and May 3rd, 1879—and if you find none upon that statement say "I find none," and if you find any mention it—say "I find that there were no sales made."

A. I find none.

Cross-examination resumed by Mr. DE GRAY:

Q. Were there any advertisements that were made between those dates by the sheriff?

A. Yes, sir.

Q. Point it out on the paper in your hands.

A. There they are, you see—"January 3rd, 1876, and January 4th."

Q. On what dates were they advertised?

A. The dates they were advertised I can't say, but the date of sale was January 3rd and 4th, 1876.

Q. From January 4th, 1876, to May 3rd, 1879, how many were there?

A. One property.

Q. Then from January 4th, 1876, to May 3rd, 1879, there was no property advertised at all?

A. No, sir.

Map referred to in the testimony of Henry C. Brown, marked "Defendant O."

To be transmitted in the original, along with this transcript of appeal, as per agreement at page 53 of this transcript.

439 *Testimony of Henry C. Brown, Marked "Defendant P 1." Filed Jan'y 17, 1898.*

United States Circuit Court, Eastern Circuit Court.

JOHN G. WARNER
vs.
CITY OF NEW ORLEANS.

Testimony taken in the above numbered and entitled cause on the 8th day of December, on behalf of defendant, before Henry J. Carter, Esq., special examiner appointed under order of court.

Appearances.

B. K. Miller, counsel for defendant City of New Orleans.
S. L. Gilmore, Esq., counsel for City of New Orleans.
R. De Gray and Wm. Grant, counsel for complainant.

H. C. BROWN, witness sworn on behalf of defendants, testified as follows:

Direct examination.

By Mr. MILLER:

Q. What is your profession?
A. I am a civil engineer.
Q. How long have you been a civil engineer?
A. About 35 or 40 years.
Q. Have you filled any public positions in the line of your profession?
A. Yes, sir.
Q. Please name them.
A. I have been the city surveyor of the city of New Orleans. I have been on the State board of engineers and assistant city surveyor of the city of New Orleans. I have been on railroads and I was engineer in the Confederate Army.
Q. Are you familiar with the system of drainage some of the work of which was done by the Mexican Gulf Ship Canal Company and afterwards by Warner Van Norden as assignee of the company?
A. From December, 1874, until May or June, 1876, I was engineer in charge of all the drainage being done by Van Norden. We knew nothing but the canal company.
Q. What were those dates you gave?
A. December, 1874, to about the 26th of May was the last estimate given, 1876.
Q. What was your connection then, with the city government?
A. I was assistant city surveyor—the office of city engineer was then called city surveyor.

Q. Did you have occasion to become familiar with the plan
440 or the system of drainage, the work of which was being partly executed by the canal company and by Van Norden?

A. I was.

Q. The drainage territory was divided into how many districts?

A. Four—four drainage sections or districts.

Q. What, in your opinion, would have been the usefulness and effectiveness of that plan and system and of the work constructed under it, as regards furnishing the city of New Orleans with proper and sufficient drainage?

A. Counsel for complainant objects to the witness expressing an opinion as to the sufficiency of the plan, which he has not explained and which has not been placed before the complainant as part of the evidence in this cause.

Q. Are you familiar with that plan and system?

A. Yes, sir; I have the plan right here with me.

Q. As part of your testimony we will offer that plan.

(Witness produces plan referred to, which is offered in evidence by counsel for defendants, and said plan is marked "Defendants A.")

Q. Mr. Brown, what is your opinion as to the effectiveness and usefulness of that plan or system of drainage of the city of New Orleans, within the drainage districts created, if completed?

A. Of this plan?

Q. Yes.

A. Well, this plan completed would never have drained any portion of the city of New Orleans between the river and five blocks this side of Claiborne street.

Q. What is the distance between the river and the point five blocks this side of Claiborne street?

A. From the river, at Canal, to Claiborne street, it is about 4,000 feet; at Esplanade street, about 5,000 feet, and at Enghein or Lafayette avenue, about 5,000 feet; at Louisiana avenue about 10,000; at the upper line of what was known as the old city of Jefferson, Joseph street, about 12,000 feet; at Carrollton avenue about three miles, or 15,000 feet.

Q. Can you estimate the superficial area of the land contained within the territory which you have described?

A. No, sir; but if I had known that that question would have been asked me, I could have given you the exact area.

Q. Could (you) give an estimate, about?

A. I suppose about 24 or 25 square miles.

Q. Could you figure that out for us and give it to us?

A. Yes, sir; I can give it to you exactly tomorrow. In my opinion the city of New Orleans never can and never will be properly drained with the gutters in the condition they are now and the reservoir canals as far off from the river as they are.

Q. Would that objection apply to the plan or system under which the company and Van Norden worked?

441 A. This plan provided for no canals on the river side of Claiborne street; of course it couldn't have been effective, it couldn't have been of any benefit to the resident and business portion of the entire city of New Orleans.

Q. What proportion in point of area would this non-drainable section that you have spoken of, compare with the entire area of the city?

A. That portion they couldn't drain, between Claiborne street and the river?

Q. Yes, sir.

A. ¾, I am speaking not at random, but about ¾.

Q. Speaking as of dates prior to 1876, about what proportion of the population of the city of New Orleans is in that area as compared to its entire population?

A. 95—well, 80 %, because back of Claiborne street, in the fifth ward is considerable population, 80 %.

Q. What kind of property is principally situated between Claiborne street and the river?

A. More than ¾ of the assessed value of the city, I should imagine, or very near it.

Q. Where are the principal commercial sections and thoroughfares of the city, within or without——

A. They are between the Mississippi river and Claiborne street.

Q. Generally what is the description of the kind of ground or land beyond Claiborne street?

A. With the exception of the 3rd, 4th, 5th, 6th, and 7th municipal wards, the land beyond Claiborne street is all swamp, with those exceptions—the 1st, 2nd, 10th, 11th, 12th, 13th, 14th, 16th, 17th, 8th and 9th municipal wards, the land beyond Claiborne street is a swamp.

Q. What is the character of this land on the other side of Claiborne street, that is to say, away from the river, that you speak of as being of small value or something like that?

A. It is swampy.

Q. In that territory beyond Claiborne street, what proportion is swamp and what land or ground that can be used for ordinary purposes?

A. It is all swamp except in that portion that has been built up until you strike Metarie and Gentilly ridges, then you have about one-half mile of high ground, that is, one-half mile across—then you go down into a swamp lower in fact, than the lake, and the entire area between People's avenue and the upper line of the city of New Orleans and between Metarie and Gentilly ridges and the lake, is a swamp, almost valueless.

Q. Swamp land of that character as compared to land different from that, lying beyond Claiborne street, is about what?

A. The quantity, do you mean?

Q. Yes. What is the relation of one to the other in point of quantity?

442 A. It is about 13 square miles of swamp land between the ridges and the lake and between People's avenue and Upper Line street.

Q. What is the balance of the area of land contained in the drainage districts outside of the 13 miles of swamp land that you speak of?

A. I can't state now, but I will give it to you tomorrow.

Q. Do you remember under this Mississippi and Mexican Gulf Canal system of drainage, how many drainage canals were provided for in the 2nd drainage district?

A. In the 2nd drainage district there was the Claiborne canal reaching from the New canal up to the Upper Line—there was the Upper Line canal; there was the Melpomene tail-race, it was not intended for drainage, it was not intended for the drainage water to go out through. The Melpomene canal and Camp Street canal, Nashville Avenue canal—well Claiborne canal is also called 10th Street canal in Carrollton, and the Dublin canal—they were the canals provided for in this—in the 2nd district by this plan.

Q. Were they, or not, sufficient to do the service that was required?

A. No, sir, not one-fourth of it.

Q. By reason of what?

A. They were entirely too far away, they were out in the woods away from every place, the water had too far to go to reach them.

Q. About what distance would it have to go?

A. I gave that in the other part of my testimony.

Q. Would you mind repeating it so I can get it altogether?

A. In the first place would be Louisiana avenue, that is 10,000 feet—Joseph street is about 11,000 feet, at Carrollton avenue 15,000 feet.

Q. What should those distances have been properly?

A. I think all reservoir canals where you are using the open system should not be over a quarter of a mile apart, as they will not drain over—well, they will not drain over 1,200 feet.

Q. What is a quarter of a mile expressed in feet?

A. 1,320 feet.

Q. The second drainage district included what municipal districts of the city?

A. The entire seventh municipal district, the entire fourth, the entire 6th and part of the 1st municipal district.

Q. The fourth district was formerly the city of Livaudais?

A. Yes, sir, and the first district was formerly the city of Jefferson, and the 7th was formerly the city of Carrollton.

Q. Coming to the 1st drainage district, pursuing the line of testimony which you have given—what would you say concerning the first drainage district?

A. The canals provided for——

Q. Yes.

A. There was the Hagan Avenue, the Broad Street, and Carrollton Avenue. No canal in the first district was ever provided for on Claiborne street in this plan.

Q. None?

443 A. No, sir.

Q. Would that have been a necessary or proper provision?

A. Certainly they should have had one on Claiborne street and one on Rampart street.

Q. You say there was none on Claiborne street?

A. Yes, sir. The reservoir canals—well I have given you Hagan Avenue, Broad, Carrollton and Golvez Street-, those were the reservoir canals, that is, canals running parallel to the river.

Q. What are the respective distances of those canals from the river?

A. The Galvez Street canal is about 4,800 feet from the river, then comes Broad, which is in the vicinity of 2,000 feet back of Galvez, that would be 6,800 feet from the river; then comes Hagan Avenue, which is about the same distance back of Broad, that would be about 8,800 feet from the river; then comes Carrollton Avenue, I suppose about 11,000, 12,000 feet from the river, possibly more.

Q. How many such canals would have been required to have furnished a proper service in the first district?

A. In my opinion you couldn't have had a canal at Rampart street, not an open canal, but you could have had a closed canal, same as the Camp Street one; there should have been one at Rampart street and at Camp street.

Q. The effect of not having such canals or something that would do the same service, would have been what upon the system?

A. The system would have been a failure.

Q. How much of the district would have been undrained by reason of the want of such canals?

A. Almost the entire populated portion of the city would have been undrained.

Q. What area of ground?

A. That I promised to give you tomorrow.

Q. What kind of section of the city would that be that would have been left in that condition?

A. The most valuable portion used for business and residences.

Q. Have you anything else to say, Mr. Brown, in that line, regarding the first draining district?

A. Nothing, except I didn't give you all the canals—I didn't give you what they did under this system, they dug the Poydras canal, I have not given you all the canals by a jug full—the Orleans canal was dug from the Metarie ridge to the lake, a distance of 6,100 feet, from the Metarie ridge to the lake.

Q. That is the length of the canal?

A. Yes, sir.

Q. What kind of country did that go through?

A. With the exception of the ridge, an entire swamp.

Q. What proportion of swamp and what proportion of ridge?

A. I suppose there was possibly 1,500 feet, well, about 2,600 feet ran through the ridge and the balance ran through the swamp—let me get that right—I am taking these figures from the map—I would ask that the 6,100 feet be erased because it is wrong—I am speaking

from the map. The distance on the Orleans canal between Harrison avenue and the lake is 6,100 feet—I have made an error and want to correct the error—do you want me to say anything about the other canals dug there?

A. No.

Q. I want to correct that error—the distance should be on Orleans canal from Metarie ridge to the lake, 14,000 feet.

Q. Is there anything you wish to add to what I have been asking you about, the first drainage district?

A. No, I think I have answered everything.

Q. You say the one lying next door to that is what?

A. The third drainage district.

Q. Taking the third drainage district—how many canals were provided for by this system you are speaking of?

A. There was the Claiborne canal through the entire district.

Q. Beginning where and ending where?

A. Beginning at the old canal and coming down to Poland street.

Q. That canal was at what distance from the river?

A. That canal was nearest to the river.

Q. About what was the distance?

A. About four thousand feet. The Claiborne canal runs from four to five thousand feet from the river, all the way down through the third and fourth drainage districts.

Q. Were there any other canals provided for between this Claiborne canal and the river?

A. No, sir.

Q. What effect would that have upon the drainage of the district?

A. It would not drain it.

Q. No part of it?

A. No, sir. You could only drain it about five blocks this side of Claiborne street.

Q. Out of how many lying between Claiborne street and the river?

A. I suppose about 12 or 14 blocks, 15 maybe.

Q. How, in that district, is the population distributed between Claiborne street and the river—where is it densest?

A. From St. Claude street to the river.

Q. And St. Claude is what distance from Claiborne?

A. About five or six blocks.

Q. Where is the larger amount of property in quantity and in value?

A. Between St. Claude and the river.

Q. As you leave the river going back towards the lake, Lake Pontchartrain, how does the amount of population and property go, increase or diminish?

A. After you get beyond St. Claude street you switch off, you jump clear over the third and go on the fourth.

Q. No—I am talking about the third district.

A. Well, the property—a good deal of the property between Broad

street and Claiborne street is residence property. It is not
445 swampy like properties in other portions of the town back of Claiborne street, but the valuable property is between Claiborne street and the river.

Q. How many canals, in your opinion, should have been placed between Claiborne street and the river?

A. In the first drainage district?

Q. No, in the third.

A. At least one. I think though, if I had charge of it, I would put a canal at Rampart street and one at Royal.

Q. That would be two?

A. Yes, sir.

Q. Now, passing to the fourth drainage district which is next—how many canals were provided for in that district?

A. The only reservoir canal provided for in that district was the Claiborne canal and the Florida walk.

Q. The fourth drainage district lies, for instance, between what streets, up and down?

A. From Lafayette avenue down to the lower limits of the city.

Q. Major Brown, what do you mean by Florida walk?

A. Florida walk was the outside canal provided for in the fourth drainage district.

Q. That runs parallel or perpendicular?

A. It runs parallel to the river from Lafayette avenue to the lower limits of the city, as prolongated from the river.

Q. What was the distance between the Claiborne canal and Florida Walk canal?

A. About five thousand feet, between four and five thousand feet,

Q. That is very nearly a mile?

A. It was not a mile.

Q. Very nearly a mile?

A. Yes, sir; very nearly a mile.

Q. What canals, in your opinion, would have been required between Claiborne canal and the river?

A. There should have been a canal at Rampart street. The fourth district is very narrow, flat, and a canal I don't think—well, a canal at Rampart street would have drained the city, would have drained that portion of the city.

Q. With the first canal from the river being at Claiborne street, what effect would that have on draining the district?

A. The district is always overflowed after a rain, it don't drain it at all.

Q. A canal at Claiborne street you say does not drain it at all?

A. No, sir.

Q. Where was the most valuable property in that district—between Claiborne street and the river?

A. Yes, sir. There was very little improved property beyond Claiborne street.

Q. Did you have any connection with the city government in 1876, when the city purchased from Van Norden?

A. Yes, sir, I was assistant city surveyor.

Q. Who was the city surveyor?

A. Thomas S. Hardee.

446 Q. Is he living or dead?

A. He is dead.

Q. Had you any particular connection with this work of drainage as assistant city engineer—surveyor?

A. I had charge of it.

Q. Did you enter upon any examination or study of the subject of drainage as then being prosecuted when you entered the service of the city?

A. Yes, sir, I reported to Major Hardee within three months after we went into office, that the plan we were working under was not feasible.

Q. What is that plan?

A. The plan of this company.

Q. You mean the plan of the canal company and Van Norden?

A. Yes, sir.

Q. What was done by Major Hardee?

A. We went into the council and told them we knew it would not drain the city and it was throwing away money uselessly.

Q. Did you make any official report verbally or otherwise, to anybody, of the result of your examination and study of this subject?

A. I did, to Major Hardee and the council, verbaliy, time and again.

Q. To what effect?

A. That it was not feasible, that the canals were too large and they were in the wrong places, they were building the cart before the horse, building canals and making no provision at all for machines and were not putting the canals in the proper places to drain the city of New Orleans.

Q. Who was not putting——

A. This plan did not put them—I will show you why. They built canals out on Taylor and Harrison avenues out in the swamp, and I don't believe anybody ever was on that ground in their lives until they went there to seek for those canals, and I don't believe anybody has been there since except hunters. The Upper Line protection levee and the Lower Line protection levee and Hunt's roadway, was built on top of the levees—these people got 50 cents a yard, that was a useless expense of money.

Q. What about 50 cents a yard—was that a fair price?

A. No, sir; it was an exorbitant price.

Q. What would have been a fair price according to values then?

A. In cash, the excavation and cutting of the canal, 25 cents would have been a fair price for it.

Q. Do you mean for both or for each?

A. 25 cents for each, a cubic yard; I don't mean for building the roadway they built, I mean for dressing the canal up, they built a roadway on top of these levees.

Q. Major, that 25 cents was for digging canals and 25 cents for building levees, or 25 cents for each kind of work?

A. 25 cents a cubic yard for building the levees they built was a big price.

Q. Do you include in that the cost of excavating and building?

447 A. Yes, sir. They were digging it with dredge-boats, and those dredge-boats averaged about 12,000 yards a month.

Q. You mean 25 cents all through, for everything?

A. Yes, sir. Those dredge-boats averaged 12,000 yards a month, and it didn't cost them over three or four hundred dollars a month to run them.

Q. In 1876 the city assumed charge of this work that had been previously done by the company and afterwards by Van Norden?

A. Yes, sir.

Q. What did the city do about the work—go on with it or stopped it?

A. They stopped it, they had no money to go on with, except drainage taxes, and it was not available for that purpose.

Counsel for complainant objects to that answer on the ground that it is a matter of law and not a matter of fact. The resources of the city of New Orleans to pay for work other than drainage work *was* ample.

Q. Was there any other reason why the work was stopped?

A. It was stopped as I say, because we did not think it was feasible—we knew, in our opinion, Major Hardee, he is dead, so I will say in my opinion, the work was of no account; the work between Metarie ridge and the lake was criminal for them to have done anything of the kind, the work they did do.

Q. What particularly was wrong with it?

A. The revetment levee at the lake should not have been built, simply because it was not necessary. A levee on the lake shore would have answered every purpose in the world and could have been built for one-half the cost of the revetment levee.

Q. Any other reason?

A. None that I know of.

Q. About when was it, that the city ceased doing any work at all?

A. Under this contract?

Q. In the completion of the canal company and the Van Norden system.

A. On the 26th of May, 1876, the final estimate was issued.

Q. In 1876 when the city assumed control of the work—about how much of the entire work contemplated by the system had been completed by the company and Van Norden?

A. All the work had been completed except the revetment levee, the Florida Walk canal and a portion of the Clairborne canal.

Q. About what proportion of the entire work was there uncompleted?

A. About half in cost.

Q. I don't mean in cost—I mean to say of the entire amount of work in area or quantity?

A. There was not over one-fourth of the work left uncompleted.

Q. You mean that three-fourths had been finished?

A. Yes, sir—but the cost of the uncompleted portion——

Q. I will fix that—I want to get these things altogether so
448 we will not have to search in four or five different places—suppose that this one-fourth that was unfinished had been completed in the same manner that the other three-fourths had been finished—to what extent—would there have been supplied to these drainage districts a sufficient drainage?

A. It would not have helped them a particle.

Q. Would there have been any better service of drainage furnished these districts if the unfinished one-fourth of the work had been completed by the city than they had where Van Norden quit working?

A. It would not have helped the drainage a particle.

Q. Would the land intended to have been drained, received any additional benefit, by finishing the entire system by the city?

A. If this entire plan had been carried out it would not have benefited the city of New Orleans in the resident and business portions one dollar's worth.

Q. Was the drainage needed in those parts of the city?

A. Certainly it was needed, it is needed yet.

Q. What would have been the cost of completing the unfinished part of the work?

A. Owing to the immense cost of the revetment levee it would have cost nearly three millions of dollars. The revetment levee alone would have cost nearly one million.

Q. There had been part of the revetment levee made by Van Norden?

A. There had been 2,100 feet made, extending from the New canal to the Upper Line.

Q. What part of the entire length of the revetment levee was uncompleted—about how much?

A. I think this was about $\frac{1}{10}$ of it, possibly more.

Q. At the price fixed by the act of '71, that is to say, 50 cents a cubic yard for excavation and 50 cents a cubic yard for levee building—what would have been the cost of that?

A. For that 2,100 feet?

Q. Yes.

A. I have no idea, I would have to figure on that.

Q. Will you figure that out?

A. Yes, sir.

Q. How was the revetment levee built—of what?

A. The levee was built of dirt, and the revetment of wood.

Q. The revetment, describe that.

A. The revetment is the front portion of the levee, what is commonly called a bulkhead—but instead of being perpendicular it was laid in an angle of 45 degrees and the trouble was that when the lake was rough the swells would come up and strike this woodwork and go back—they anchored the revetment by 12 x 12 timbers and when the swells would come up they would go back and

strip these timbers, and in a short time the revetment levee was gone.

Q. What was the character of work that had been done on this revetment levee, this 2,100 feet?

449 A. The work was good enough, except the revetment was faulty.

Q. In what way?

A. It was not built properly on account of the slope that it had and anchoring it by 12 x 12 timbers laid parallel with it, when the water—in rough weather when the water would come up there it would come down striking these 12 x 12 timbers with great force and in a few years the revetment was gone. I became engineer in 1880, the work was finished in 1876, and in 1880 I had to replace the entire revetment.

Q. How long would that revetment have lasted had it been properly constructed on account of the difficulty you suggest there?

A. I constructed a perpendicular revetment and it is there yet.

Q. You criticise that work then, on account of the revetment being at an angle of 45 degrees instead of being perpendicular?

A. Yes, sir.

Q. Aside from any figures fixed by the act of 1871—what do you estimate would have been the cost to have built the balance of the revetment levee?

A. Under this contract—they were working under a contract—is that what you want me to answer?

Q. I asked you that and you said you had to figure on that.

A. On the cost of the revetment itself. I have figured already on the cost of the balance of the work, because I took the 2,100 feet, I knew what that cost per foot and I multiplied the other data I had.

Q. What would that have amounted to?

A. Nearly a million and a half of dollars.

Complainant objects to all the evidence given by this witness, on the ground that the plan concerning which he has testified to, was prescribed by the act of the legislature of the State, supplemented by the action of the council of the city of New Orleans, who were to design and locate all the canals, and that over their designation and location the contractor had no manner of control whatever, and that whether the plan was a good or bad plan, feasible or unfeasible plan, in no way concerns any issue in this case.

Cross-examination.

By Mr. GRANT:

Q. Who made the plan for the drainage of the city of New Orleans?

A. I don't know, sir. Mr. Bell I presume, this is the only thing I have seen, (referring to map marked Defendants A).

Q. While you had charge of the drainage portions from 1874 until 1876 as assistant city surveyor—were you not acting under the orders and directions of the city surveyor?

A. Certainly, sir.

Q. And the city surveyor's department was acting under the direction of the city council of the city of New Orleans, was it not?

A. Yes, sir.

450 Q. The city surveyor reported his plans to the city council and they were approved by the city council, were they not, and ordered carried into effect?

A. Yes, sir; anything new he had to report he certainly reported it.

Q. What were your particular duties as assistant city surveyor?

A. I had charge of the entire drainage of the streets. Major Harrod was in charge of the wharves and railroads, he was also assistant city surveyor.

Q. Your duty was also to estimate and to report to the city council the amount of work that had been done by the contractor?

A. I estimated and reported, measured the work, and made out a certificate and carried it into Major Hardee; Major Hardee signed it, then it went down to the comptroller and was put into an ordinance.

Q. And the work you estimated for, was work previously authorized by the city council?

A. We found it there, work done under this Bell plan, the Flanders council had authorized the work.

Q. Upon your estimates then, the city audited or approved your estimates for the work and the——

A. I made the estimate, made the certificates, carried the certificates to the city surveyor, who approved them, they were then sent down to the administrator of public accounts, who drew up an ordinance, the ordinance was passed by the council, promulgated, and then the administrator of accounts then drew the drainage warrants in payment of the work.

Q. You never made any estimates for work unless it had been authorized, did you?

A. I never made any estimates for work except on that plan—well, now, with the exception of some extra work that was absolutely necessary in crossing over the railroads, there was considerable work, it cost a great deal of money, that I did on my own account and the council approved of it.

Q. In substance, it was the same thing?

A. I was authorized; I knew I would be or I wouldn't have done it.

Q. Can you give a brief outline, verbally, of the plan of the drainage of the city of New Orleans?

A. This plan?

Q. Yes, this plan.

A. This plan provided—I will have to take the map—this plan provided for a new canal——

Q. The system of drainage?

A. You want me to give you what they—what it provided for?

Q. You have spoken of plans—I want to know what the plans in a general way provided for.

A. They provided for a canal on Upper Line street, from Tenth street to the lake; it provided for a canal on Claiborne street from Carrollton avenue to the lower limits of the city—it provided for a canal on Orleans street from Metarie ridge to the lake—it
451 provided for a canal on People's avenue from Florida walk to the lake—it provided for a canal on Florida walk from Lafayette avenue to the lower limit of the city—it provided for a canal on the lower city line from the Mississippi river to Florida walk—it provided for a canal on Harrison avenue from Bayou St. John to Orleans street, on Taylor avenue from Bayou St. John to Orleans street—it provided for a canal on Poydras street from Carrollton avenue to Galvez street—it provided for canals on Hagan avenue between the two canals, on Broad street between the two canals, on Galvez street between the two canals, on Carrollton avenue from the New Basin canal to Orleans street—it provided for a canal on Marigny street from the intersection of Florida walk at Elysian Fields street to Bayou St. John—it provided for a canal on St. Bernard street from Claiborne street to Broad street—it provided for a canal on London avenue from Marigny street to the lake. That was about what the plan provided for.

Q. This plan refers to the drainage of the city and the disposal of the rainfall within the protection levees, didn't it?

A. Yes, sir, between the protection levee at the lake and the river.

Q. And the scheme also provided for a protection levee from the river on Poland street to the lake?

A. No, sir, from the river on the lower limit to Florida walk and from Florida walk to People's avenue, and from People's avenue to the lake.

Q. And along the lake?

A. And the revetment protection levee along the lake from People's avenue to Upper Line canal.

Q. And one on the line dividing the city from Jefferson parish?

A. That is what I call the Upper Line.

Q. Were you acquainted with Mr. Bell?

A. Intimately.

Q. Was he a competent and experienced engineer?

A. I always considered him such.

Q. This system also provided for certain pumping stations to deliver the water from the interior canals into the lake, didn't it?

A. Yes, sir.

Q. The substance of your complaint to this system, is, that the canals were—which you call reservoir canals or interior canals—were not provided for about every 1,400 feet?

A. Yes, sir.

Q. That is your main cause of complaint of that system?

A. In my opinion you couldn't drain the city without providing them.

Q. And if there had been those canals provided for, they would have been able to handle all the surface water rapidly and deliver it into the lake by the use of pumps?

A. I think so. I think this present plan now beginning, provides for all of that; I think that will do it.

Q. Then, if the city had continued, had added to the system by digging these additional reservoir canals, the system would have been completed?

452 A. With proper drainage machines, pumping stations, yes sir.

By Mr. DE GRAY:

Q. Mr. Brown, you have stated it would cost to complete the protection levee on the lake-shore front, a certain amount of money?

A. About a million and a half dollars.

Q. And you have further stated that this work could have been done for 25 cents a cubic yard?

A. In my opinion, it could have been done for that for cash.

Q. In 1876; what could it have been done for along in June, 1876?

A. I was speaking of that time.

Q. No, you spoke of all time?

A. It could have been done for the same price today, for 25 cents. We are getting levees built for ten and twelve cents.

Q. I want you to tell us, judging now by the price that was paid by the city to the canal company, what the city could have had (it) done for at 25 cents a cubic yard?

A. If the city of New Orleans had provided cash money and let the canals out, it could have been done—they could have got the price I believe at 25 cents.

Q. So then, I want to know how much it would have cost to have completed the protection levee on the lake shore at 25 cents a yard, and not at the price that was paid for it by the city to the canal company?

A. I will give you that tomorrow.

Q. You have seen fit to suggest, Mr. Brown, that the prices they were paid, were very extravagant—when I call your attention to the fact that none of them were paid for in cash——

A. When I speak of 25 cents a cubic yard, I am speaking of cash.

(Q.) When you have spoken of it as being extravagant, that is 50 cents for excavation and 50 cents for dressing the levee, that was an extravagant price if it was paid for in cash, you mean?

A. Yes, sir.

Q. Now, suppose the payments were made in drainage warrants and those warrants were afterwards taken up by the issue of bonds of the city of New Orleans, and those bonds of the city of New Orleans were worth 50 cents on the dollar—what would you say of the price then?

A. As a matter of course you pay in depreciated paper—but when I speak of 25 cents, I mean that a man gets every month his estimate. If he has an estimate of $10,000 he gets $10,000 in cash not in warrants. What the price of warrants were at that time or what they are today I don't know anything about.

By Mr. GRANT:

Q. Don't you know that prior to 1876, that the price for levee-building was from 50 cents to 60 cents a yard?

453 A. Yes, sir—and do you want to know the reason it was that much?

Q. Yes.

A. I am almost prepared to prove it. Up to 1876, a levee contractor had to divide with the politicians. The Morganza levee, a levee that I know well, all about, that is a matter of record, they got 50 cents a yard for it, for making a spongy levee out of old boxes and barrels, then they go into the legislature and make a division of fifty and sixty thousand dollars. The first water that struck that levee it went away. There is no man in the world where he has got to give up ⅔ of his contract price, can build a levee at 25 cents a yard.

Q. Is it not true that the price for levee-building at that time was very much higher than it is today?

A. Yes, sir; but there never has been since 1876, but one or two levees that cost over 25 cents a yard and it was extraordinary bad work. They are paying today as high as 37½ cents, but the party has to carry the dirt 1,000 feet. But where the dirt can be got right at the base of the levee, even in '76, with the exception of a large levee and prior to '76, where dirt could be got right at the base of the levee, the price was not over 25 or 30 cents.

By Mr. DE GRAY:

Q. The question is, did you have any personal knowledge of the matters concerning which you have testified to as to the division paid between the contractor and the politicians?

A. No, sir.

Q. All that you give is assumed?

A. It is from hearsay which I gather from the contractors.

Q. Of your own knowledge, you have no information?

A. I don't know anything about —; I was not on that side of the house.

Q. How old is New Orleans?

A. I have seen a plan of 1770; I have one.

Q. From 1770, down to the present date, has there been any drainage of any part of the city of New Orleans, and effective drainage?

A. That is going too far—if you will come back to my time, to '60?

Q. Are there any evidences of there ever having been any other drainage of the city of New Orleans or the lands embraced and shown on this map which you have produced?

A. New Orleans since I have known it, has never been properly drained.

Q. It has never been properly drained, but has it been drained at all?

A. Yes, sir; to a certain extent. If you didn't have the canals

that are built and the drainage machines, the water would go off by evaporation, it couldn't get off by the ridges.

Q. Could you live in New Orleans then?

A. No; not without some kind of drainage.

454 Q. Then, there has been some drainage?

A. Yes, sir; ever since I have known it, some drainage.

Q. What is the extent of the ordinary average of rainfall per year?

A. About five feet.

Q. How does that five feet of rainfall get out of the city?

A. The majority of it goes out by the drainage canals, a great deal of it goes off by absorption and evaporation.

Q. How many drainage machines are there?

A. There is the London Avenue, the Bienville, the Orleans, the Melpomene and the Dublin Avenue and the Jordan Avenue; the machine is built but there is no canal leading to it to drain it.

Q. After there has been a heavy rainfall, how long does it take those machines to remove the accumulative matter within the basin?

A. That depends as a matter of course on the rain.

Q. I am talking about an extraordinary rain?

A. It would take two or three days.

Q. If there was not any of these canals and these machines, how long would it take then, to remove it—would the water be removed any other way except by evaporation and absorption?

A. No other way except by evaporation and absorption, simply from the fact that the natural drainage of the city of New Orleans was destroyed by the new canal and the old canal.

Q. And those were built years and years ago?

A. Yes, sir.

Q. Long before anything of this kind was thought of?

A. Yes, sir.

Q. As I understand this act of the legislature and the ordinance of the city of New Orleans, the purpose was to do with the territory to be drained, the same as a sugar-planter does with his plantation, to wit: to build a levee all around it or to have it covered with levees all around it, is that right?

A. I don't know of any sugar-planter that has his place drained that way.

Q. The purpose was to build levees all around this territory?

A. Yes, sir.

Q. The levee in front was the levee of the Mississippi river?

A. Yes, sir.

Q. The levee in the rear was the levee built on the lake shore?

A. Yes, sir.

Q. The levee above was the Upper protection levee?

A. Yes, sir.

Q. And the levee below was the Lower protection levee?

A. Yes, sir.

Q. If all those levees had been built and then the necessary interior canals had been in the places that you have described and the

necessary pumping machinery had been located and put in operation—would there have been any difficulty for the city of New Orleans to have drained that territory?

A. If everything, as I have described, and the plan I have
455 formulated here before you, was ever carried into effect, there would never be an overflow in the city of New Orleans from rain water.

Q. You have said that there should be canals nearer the levee than the Claiborne canal. I will take for instance, part of the levee that is located on each side of Canal street—what is the natural fall from the levee front to Claiborne street, the dip of the land?

A. I think it is about six or seven feet—but I can answer from the top of the water, extraordinary high water, to the land at Claiborne street, is 12 feet, that is, the water in the Mississippi river in 1876.

Q. Will you please ascertain and let us (know) tomorrow whether or not the fall from the levee, not from the top of the water, to the canal at Claiborne street, whether or not that is 15 or 16 feet?

A. I will bring you a certified profile. I can give you the exact fall. If you designate the streets you want it, on Canal street, etc., I will give it to you within a 100th of a foot.

Q. What is the fall from the levee at Canal street to Claiborne street from the levee at Louisiana to Claiborne street, at Esplanade, at Jackson. You said in the former part of your direct examination that there were no drainage canals on the river side of Claiborne street, as I understood you, in any of the drainage districts—isn't that a mistake?

A. No, no, I said except the Melpomene and the Camp Street canals, I was speaking then of '76, not at the present time. I am not speaking of the present time.

Q. Wasn't the Melpomene and Camp Street canals before 1876?

A. I say I was speaking of 1876, there are other canals now between Claiborne canal——

Q. Was the Nashville canal there?

A. No, sir, it was not, it was built by Brosnan, and the Pitt Street canal was built by your humble servant.

Q. If I am not mistaken I can show you by figures of your own——

A. No, sir, it was not built.

Agreement.—It was agreed that the plan spoken of by Mr. Brown shall be supplied by a duplicate copy.

Here—by consent of counsel the taking of testimony was adjourned by the examiner until tomorrow at 2 p. m.

NEW ORLEANS, *Dec. 9th*, 1897—2 p. m.

The taking of testimony was this day resumed, at same place and same hour. Examiner and all counsel present.

Examination of H. C. BROWN, witness on behalf of defendants, resumed, who states as follows:

I was asked yesterday to give the area between Upper line, Lower line, the Mississippi river, and the Metarie and Gentilly ridges. This area is 18,808 acres. I was also asked to give the area in the rear of the ridges between the Upper Line and Lower Line
456 canals, and the ridges and the lake. This area is 7,212 acres. I was asked to give the cost of the revetment levee—the revetment on the levee cost $47,700 in round numbers—the levee itself cost $126,000. I was also asked to give the cost of this levee at my estimate from the Upper line to the Lower line, this levee would cost by my estimate, 25 cents a cubic yard, $80,000—in fact, the entire levee from the New canal to Orleans canal and from Bayou St. John to People's avenue, has been built at a cost, the first mentioned, 25¾ cents, the last mentioned at 26¼ cts. The 17th canal has been built at 19⅞ cents, that is the cost, that is cash. The cost to have carried out the revetment levee as per the plan before introduced in evidence, would have been, for the levee work, $1,290,000—for the revetment, $236,000—a total of $1,526,000—that is, the unfinished portion of it. To that should be added $173,000, the cost of the finished portion. I was also asked to give the fall from the river to Claiborne street at Esplanade avenue which is 9 feet, at Canal street 14 feet, at Canal street 10 feet of this fall occurs in the first two thousand feet. I was also asked to give the fall at Louisiana avenue which is 15 feet, ten feet of this fall occurs in the first 5,000 feet. At Jackson street the fall is 13 feet, 10 feet of this fall occurs about half way to Claiborne street. I believe that is all the questions I was asked. I will state also—and the Upper Line protection levee at the river, 7 feet.

By Mr. DE GRAY:

Q. You were asked, Mr. Brown, to give one thing which I don't think you have. You have stated what it would have cost to have completed the unfinished portion of the protection levee in round numbers, at a million and a half, that is figuring it at the same price that was paid for the portion that was completed between the New basin and the Upper protection canal and levee.

A. Yes, sir.

Q. You were also asked to state what it would have cost at the price you said the work could have been done for if paid for in cash, to wit: 25 cents a yard—how much would it have cost at that time, the protection levee on the lake front?

A. I didn't answer that because I didn't—though as a matter of course I will answer that question without giving my reasons for not doing so. I have the figures here. It would have cost $322,500. The yardage for the dirt alone, I am not speaking of the revetment.

Q. The city could have—if paying in cash when she took possession in 1876, could have completed that work on the lake front for the amount you have estimated?

A. The levee work?

Q. Yes. How much would the revetment have cost if paid for in cash?

A. About $25,000—oh, no, it would have cost more than that. The revetment would have cost $115,000 in cash, it could have been done for that.

Q. The sum total in completing the whole of that protection levee on the lake front, the uncompleted portion, give the sum
457 total, you gave the levee and the revetment, just add it up and state what it would come to.

A. $437,500.

Q. Have you any idea how many internal canals should have been completed, should have been dug, to have this work effective, in addition to what were dug?

A. Open canals?

Q. Yes. Such as was necessary to make the thing effective.

A. To have made the drainage effective, it couldn't have been done with open canals.

Q. With open canals?

A. Yes.

Q. I understood you yesterday to say, that they required more internal canals.

A. Interior canals, yes, sir, the canal didn't have to be open to be an interior canal.

Q. How many additional internal canals?

A. Speaking right here of this section of the country, I think some means should have been provided at Rampart street, a canal or large culvert or covered canal, one at Camp street, Rampart street extending up to the New basin and extending down the entire lower length of the city. One at Camp street beginning with what is known now as the Camp Street canal and extending down to Esplanade street, those in this section of the country. The Camp Street canal should have extended about, from Felicity road to the upper limits of the city or to the barracks.

Q. I don't want to go into general details but I want to know the proportion of additional internal work that ought to have been done besides what was done, in general terms.

A. There ought to have been at least ⅓ more.

Q. Now, that ⅓ more than was done, would have been about how much, in round numbers, of excavation?

A. I couldn't answer that, sir.

Q. You know how much excavation was done?

A. I know about, I could tell exactly, I have got it all there.

Q. About how much was done, of excavation, was done, apart from the protection canals?

A. I couldn't—I should think about 400,000 cubic yards. When I spoke of ⅓ I meant ⅓ of all the money spent, I meant ⅓ of all the excavation.

Q. You think there would have been ⅓ more?

A. No, sir, I think there should have been that much more done on the interior canals.

Q. Than was done?

A. Yes, sir.

Q. What was the amount of excavation, in the interior canals?

A. I think about 400,000 yards, that is my impression.

Q. That would have been an additional 400,000 yards?

A. Yes, sir.

Q. That additional 400,000 yards would have cost how much by your figure of 25 cents a cubic yard?

458 A. You can't——

Q. Answer the question.

A. What is the use of answering the question. You ask me a question where it is a physical impossibility to construct the answer, you knew it when you asked it.

Q. I ask you how much it would cost at your figures?

A. If the interior canals could have been built in the manner—say like the Claiborne canal it could have been built for 25 cents a yard.

Q. Well, now, 25 cents a yard for this 400,000 additional internal excavation would have been $100,000 in cash?

A. Yes, sir.

Q. How was all the work that was done by the canal company and Van Norden, was it well done?

A. It was well done, there is no question about that, never has been I don't think.

Q. You were connected with the city government and you know—was there ever any work reported as done that was not actually finished?

A. Not to my knowledge there was never any work reported that was not actually finished from the first day of December, 1874, to the 26th of May, 1876, that I know of, of my personal knowledge.

By Mr. GRANT:

Q. How long since the lake-shore levee has been completed?

A. I think two or three years, it was done by the levee board of the city of New Orleans.

Q. And has it been built on the lake shore not in the lake?

A. It has been built near the lake shore.

By Mr. DE GRAY:

Q. Mr. Brown, do you, or not, know that it was the purpose, originally, of the city of New Orleans, to build the protection levee that was built from the Upper Line to the New basin, on the lake-shore front and not in the lake?

A. I hardly understand the question. (To the stenographer:) Read it please.

(Stenographer reads the question.)

A. You mean the lake-shore levee? Yes, sir; that was always the idea, to build it on the lake shore.

Q. Do you know why it was that the city of New Orleans were driven out into the lake?

A. Only what you told me.

Redirect examination.

By Mr. MILLER:

Q. Do you know of the dredge-boats and other paraphernalia for drainage that was bought by the city from Van Norden?

A. Yes, sir.

459 Q. What would have been a fair price for that property at the time Van Norden sold it to the city?

Counsel for complainant objects on the ground that the city appointed its own appraiser, Mr. Hardee, its own city surveyor, to make that valuation and that valuation as made by him is already in the record and not competent to go into the consideration of the warrants that were issued in this case and to attack the validity of the act of sale of collateral.

A. The city purchased from Van Norden seven dredge-boats, one steamboat or one steamtug, four or five steam derricks, a lot of buildings, some castings and other things. Nearly every one of the boats was dilapidated and there were a good many castings, duplicated in case of a break. I made an examination of the boats, I knew all about them, the boats were continually breaking down, they were worn out and the repairing was considerable and I was requested to make an estimate on the boats. I estimated the whole value of all the property that Van Norden was to turn over to the city, at $60,000, I made that estimate.

Q. To be sure of what I am asking you, I show you from the act of sale between Van Norden and the city—would you have any objection in——

(Counsel hands witness act of sale referred to and witness reads the list of the property described in the sale. After reading the list of property described in the act of sale of Van Norden to the city says:)

A. That is a correct inventory. I have the same in my own book.

Q. Is that the property you say is worth $60,000?

A. That is the property. Early in May I estimated that property to be worth $60,000.

Q. May, 1876?

A. Yes, sir.

By Mr. DE GRAY:

Q. Was this $60,000, Mr. Brown, which you have mentioned, in cash, or in drainage warrants?

A. I estimated the value. I didn't know anything about drainage warrants.

Q. You put the amount in cash, to be paid for that property?

A. Yes, sir.

Q. How much did you say these boats were capable of excavating in a month?

A. Dredge boats Nos. 1, 2, 3 and 4, they were the largest, could excavate from ten to twelve thousand yards a month, if they didn't

break down. I don't think any of them ever came up to that figure for two consecutive months, they would do it one month and then break down and be laid up two or three months.

Q. In your direct examination, you said these boats were capable of excavating from ten to twelve thousand yards a month right along?

460 A. No, sir. I didn't say that. They were capable—dredge-boats 1, 2, 3 and 4 were capable of dredging 12,000 cubic yards a month and they did it, too, month in and month out, but the — couldn't do as much, the Noyes couldn't do anything and I think the small boat couldn't do more than four or five thousand yards, she was no account at all.

Testimony of B. M. Harrod and L. W. Brown, Marked Respectively "Defendant P 2," and "Defendant P 3."

Filed Jan'y 17, 1898.

United States Circuit Court, Eastern District of Louisiana.

JOHN G. WARNER
vs.
CITY OF NEW ORLEANS.

Testimony taken in the above numbered and entitled cause on behalf of defendants, on the 9th day of December, 1897, before H. J. Carter, Esq., special examiner, appointed under order of court, and reported by R. H. Carter, stenographer.

Appearances.

B. K. Miller, Esq., counsel for City of New Orleans.
S. L. Gilmore, Esq., counsel for City of New Orleans.
R. De Gray, Esq., and Wm. Grant, Esq., counsel for complainant.

B. M. HARROD, witness sworn on behalf of defendants, testified as follows:

Direct examination.

By Mr. MILLER:

Q. What is your profession?
A. Civil engineer.
Q. How long have you been a civil engineer?
A. Since the war.
Q. Since 1865?
A. Yes, sir.
Q. What is your age?
A. Sixty.
Q. What public positions have you occupied in the line of your profession?
A. I have been chief city engineer, member of the Mississippi River commission and city engineer.

Q. Are you a member of the Mississippi River commission at present?

A. Yes, sir.

Q. Do you remember what portion of the canal along the lake shore and the revetment levee outside of it, which was con-
461 structed by the Mississippi and Mexican Gulf Ship Canal Company, or Warner Van Norden—you remember that work?

A. Yes, sir.

Q. The entire canal and revetment levee contemplated by the act of 1871, was it built or not built, completely?

A. It was not built completely.

Q. What portion of it was built?

A. From the Upper protection levee to the New canal.

Q. That is about how great a distance?

A. I would say about 3 or 4 thousand feet.

Q. What would have been the cost of building the rest of that canal and levee in 1876?

A. I have no recollection of those figures—I made them up carefully for the previous examination and I have read that testimony since and as they stand, I think they are entirely correct. I took some pains to make them so, but don't recollect the figures of course.

Q. The figures given by you in your testimony in the case of Peake against The City of New Orleans No. 11614, of the docket of this court, were correct?

A. Yes, sir.

Q. You have read over that testimony since giving it?

A. I read that within a week.

Q. I read you on that subject, Major, from your testimony in the Peake case, the following question and answer: Q. Now, what would it have cost to complete the revetment levee along Lake Pontchartrain from the point at which it was left off and which was to be completed on that scheme or plan? (meaning that pointed out by the act of 1871.) A. $1,166,000. Is that correct?

A. Yes, sir.

Q. Again reading from your testimony, its says: Q. And what would it have cost to complete the protection levee on the upper side of the city? A. The work on the Upper protection levee was nearly completed; there was $575,000 done and there was not more than $50,000 required to complete that work? Is that correct?

A. Yes, sir.

Q. Again: Q. What would it have required to build the protection levee on the canal on the lower side of the city? A. The People's Avenue canal, to the Lafayette Avenue canal, and from thence up to the river, I have estimated at $1,016,800. Is that correct?

A. Yes, sir.

Q. Suppose, Major, that the revetment levee and drainage canal along the lake front had been completed and the protection canal above and below the city, but without any interior canals, in addi-

tion to these excavated had been dug—what would have been the effect of such drainage?

A. It would have had no effect in draining lands remote from those canals, it would have effect on the immediate banks.

Q. Effect on what?

462 A. On the immediate banks, but not on the lands remote from them.

Q. What proportion of territory would have remained unaffected as regards the drainage?

A. I think the entire territory, except that adjacent to the banks of these canals, within a short distance of the banks of these canals.

Q. What is the character of the land lying between the Metarie ridge and the revetment contemplated along the lake-shore front?

A. It is swamp land.

Q. What is Metarie ridge?

A. It is an alluvial ridge, made by an extinct outlet of the river, runs from Kenner down to Fort Macomb, has an elevation of tide four feet more or less.

Q. How much of that ridge, Major, is included within the drainage districts created by the laws which we are dealing with here?

A. From what is called the Upper protection levee to the Lower protection levee.

Q. What is that, in distance?

A. I should guess, four miles.

Q. What is the area of land lying between Metarie ridge and Lake Pontchartrain, within the drainage districts?

A. I should think it was between 7,500 and 8,000 acres.

Q. Could you express that in square miles?

A. Divide by 640—about 12 square miles.

Q. How does the altitude of the land lying between Metarie ridge and the lake, compare with the water level in the lake itself?

A. It is about mean high tide.

Q. What is?

A. The level of the land between the ridge and the lake.

Q. Could you put that, Major, in a simpler form of expression?

A. It is about the level of mean high tide, or say 28 Cairo datum. It is about the height of the tide in the lake when it is high.

Q. Is it higher or lower than the lake?

A. It is about the level of mean high tide in the lake. The lake level is inconstant, rises and falls.

Q. When the tide is high it is on a level with this land?

A. Yes, sir, exactly.

Q. What is the character of land lying between Metarie ridge and the Mississippi river in the city of New Orleans?

A. Immediately this side of the ridge there is some land which is a great deal lower than high tide in the lake, then, as you go towards the river it gradually rises until it gets to an elevation of 15 or 16 feet above the lake, on the river bank itself.

Q. How is that land principally occupied or used?

A. The land back of the Metarie ridge is unoccupied entirely.

Q. And in front?

A. In front of the ridge there is probably about three thousand acres of swamp, by that I mean uncleared, unoccupied and undrained land.

Q. And the balance?

463 A. The balance of it is cleared, ditched and more or less occupied.

Q. You are speaking of land between the ridge and the lake?

A. No, this side.

Q. Where is the principal business and resident portions of the city between the river and the ridge?

A. This side of the ridge, between the river and the ridge.

Q. Generally, what is the value of land lying between the ridge and the lake?

Counsel for complainant objects to that question on the ground that there has no foundation been laid for such an examination.

A. I should suppose from $25 to $50 a square.

Q. Have you had any experience or means of information which enables you to give your opinion as to the value I questioned you about?

A. None, back of the ridge, I never heard of any sales back of the ridge.

Q. Why were you enabled to put on the valuation that you did?

A. I compared it in my mind with the sales that I did know of for some land that is swamp land on this side of the ridge.

Q. Is it generally habitable?

A. No, sir, not now.

Q. On account of its swampy character?

A. Yes, sir.

Q. Are you familiar with the plan or system of drainage which is outlined in the act No. 30, of 1871?

A. Yes, sir.

Q. Are you familiar with the plan or system according to which the Mississippi and Mexican Gulf Ship Canal Company and Van Norden were digging canals and building levees for a scheme of drainage?

A. As far as any records and contracts of work done I think I am familiar with it entirely.

Q. Have you given any particular study to the subject of drainage?

A. Yes, sir.

Q. To what extent?

A. I have considered it my special business or duty from 1888 to 1892, when I was city engineer, and I have continued the study ever since and I was a member of the board of engineers that prepared the plan of drainage which has been adopted now and is in course of execution now.

Q. Having before you the scheme of drainage contemplated by the act of '71, and the work which was being done under it—would, in your opinion, that have furnished a proper and efficient system of drainage for the drainage district and the city of New Orleans?

Counsel for complainant objects on the ground that any answer that might be given, would be entirely irrelevant to any inquiry that could be raised in this case, because the plan was not the plan of the contractor or the man who was doing the work. This
464 is a plan of the State of Louisiana in its general outlines and in detail was the plan of The City of New Orleans itself who is the defendant in this case, and whether a good plan or a bad plan, is entirely immaterial inasmuch as it is the city of New Orleans who is asked to pay for the work which was done for her according to her own directions and according to the plan which she herself promulgated and according to which she compelled the contractor to do his work.

A. No, sir, it would not.

Q. Will you please specify with as much detail as you can, the reasons why that system would not have been a proper and efficient one.

A. It was entirely insufficient and incomplete in, that it made no provision for the collection of storm waters from the different areas within the city and conducting them to the drainage canals which were excavated; and also having the location of the pumping stations at the lake shore instead of at some intermediate point, was an error, and they would have failed in that location to give an efficient drainage.

Q. Where, particularly, if there was any particular locality, should have been the means of conducting the waters to the drainage canals?

A. It should have been at some point intermediate between the river and lake. What I mean is this—that when the quantities to be discharged are figured up and the necessary facilities are computed, it is found that you cannot get along with a slope of less than about two feet per mile—that would have given a total slope or fall in these canals of about 12 feet. Now, they would have to be 12 feet in dish, therefore those canals at the lake end would have had to be some 24 feet deep and the construction and maintenance of such canals in this soil is very doubtful.

Q. What would be the minimum depth of the canal along the lake to make it sufficient for its purposes?

A. According to the statement I have just made, you would have had to pump the water down to about 12 feet below the lake level and the depth of water in the canal would have to be 12 feet deeper, therefore the depth of the canal in the vicinity of the lake would have had to be something like 24 feet.

Q. What would be the character of the difficulty presented in that way, serious?

A. I think so. This future drainage was very carefully considered by the drainage commission and they did not dare to recommend the construction of such canals—they thought the feasibility of it was very questionable.

Q. Do you recall at what point nearest the drainage canal, parallel to the river, that is, nearest to the river, where it was established?

A. Claiborne street.

Q. What would be the effect, in your opinion, of having no parallel canals between Claiborne Street canal and the river?

A. It would fail to give good drainage.

465 Q. To what extent would it give any drainage?

A. Claiborne Street canal is now the first parallel canal and fails altogether to give sufficient drainage. The business parts of the city are frequently under water because the distance from the river to a relief canal like Claiborne canal is too great.

Q. What is the character of the city between Claiborne canal and the river as regards population and general characteristics?

A. It contains the greater part of the city as respects both population and business.

Q. What would have been the best drained part of the city under this system which you are speaking of?

A. Where the Claiborne canal comes nearest the river, which I think would have been from Julia street down.

Q. But I mean in the entire territory proposed to be drained, not confining yourself between Claiborne street and the river—which part would have received the best service?

A. I don't think I understand your question.

Q. It was proposed to drain the entire city of New Orleans by this system propounded by the act of 1871—what I would like to know is, what part of the city would have been the best drain under that scheme?

A. If proper pumps had been put in I think the banks immediately adjacent to the canals back of the ridge would have been probably the best drained part, would have been the most affected by the system that was proposed.

Q. What part of the city would have received the least benefit?

A. The parts most remote from those canals that were included in the ship canal company's plan.

Q. That would include, or not, the thickly populated or valuable portions of the city?

A. That would include the thickly populated and valuable portions of the city.

Q. Did this system provide any difference of disposing of storm water and polluted water?

A. No, sir; it discharged the entire drainage of the city at all times into the lake, Lake Pontchartrain.

Q. That is a good or bad feature of it?

A. I think that is a bad feature.

Q. In what way would it (be) objectionable?

A. Because it is desirable to remove the drainage of the city as far from the city as possible, to a place where it could create no nuisance and where it would not interfere with the property that might become so valuable as Lake Pontchartrain shore.

Q. The lake, Lake Pontchartrain, has a tide, or not?

A. It has a tide of about eight inches.

Q. What would be the effect of discharging all kinds of water indiscriminately, into Lake Pontchartrain?

A. The lake would be polluted and in an increasing degree as the pollution increases and the drainage was prevented.

Q. And the effect in time would be what?

466 A. It would be unsanitary and consequently would shrink values there which could readily be increased.

Q. Would that concern in any way the health of the city?

A. It might, sir.

Q. The tide movement in Lake Pontchartrain, would that be sufficient to carry any of this polluted matter off?

A. It would carry some of it off. The tidal movement of the lake with the discharge of the river that flows into it, would be sufficient to keep the lake quite clear and clean if it were not polluted—the evidence of that is the north shore of the lake compared with the south shore—there is no pollution there, or very little, and the conditions are very much better than what they are here, kept so by the natural tidal movement.

Q. Would the tidal movement be sufficient to affect the condition which you describe as would result from the discharge of polluted water on the shore of Lake Pontchartrain?

A. The condition with the tidal movement would be better than if there was no movement. If it was to be perfectly still, why, the condition would become intolerable, the tidal movement would diminish the effect.

Q. But not obliterate it entirely?

A. No, sir; not obliterate it entirely.

Q. Are you familiar or do you know of the prices fixed by the act of 1871 for excavation and for levee-building?

A. Yes, sir, it was fifty cents a yard for excavation and 50 cents for shaping.

Q. Were those prices fair, reasonable, or otherwise, speaking of the time when they were fixed?

A. I think they were very nigh.

Q. What, in your opinion, would have been a fair price for such work then, from '71 to '76?

A. I think that half of that would have been a large price. The levee board contracted with the city at one time for 60 cents a yard, and at one time for 50 cents a yard, that including both shaping and excavating, and I think that was understood to be an enormous price. The contracts they let out were all under that in a great many instances.

Q. That was about when?

A. That was up to 1877, beginning, I think, shortly after the war.

Q. And the price that you name as being proper, does that contemplate payment in cash, or not?

A. That was a cash contract, or supposed to be.

Q. Cash means payment on an average of time after the completion of the work.

A. Those terms always should be put in the contract—generally the final payment is reserved say 15 or 30 days after completion.

Cross-examination.

By Mr. GRANT:

467 Q. Any system of drainage for the city of New Orleans would necessarily include, would it not, the construction of protection levees around the area to be drained?

A. Yes, sir.

Q. In the present scheme of drainage which you have spoken of as now being carried out—have you not utilized the levees which were constructed under this act of 1871 and the interior work done under it, in your operations?

A. The levee board is utilizing the levees that were built and we, the drainage commission, are utilizing the canals which were excavated, as far as they can.

Q. I understand, Major Harrod, that you have two criticisms to make of the plan under this act of 1871—the first is, an insufficient number of reservoir canals to store the surplus water and the method of discharging the water through canals at the lake?

A. Yes, sir. The first one I will put as, entire absence of additional canals for the collection of storm water and its conduit to the larger canals. I don't know that there was any new collecting canals in that plan at all, some of the old ones were cleaned out.

Q. This plan was devised and carried out under the direction of the city surveyor, W. H. Bell?

Q. (A.) After it came into the possession of the city, yes, sir. Before that I don't know whose plan it was.

Q. How many reservoir canals were there prior to 1876?

A. I think those that are existing at present.

Q. What were they?

A. There is a canal on Claiborne street, a short canal on Galvez street, a canal on Broad, Hagan avenue and Carrollton avenue and Poydras canal.

Q. You are acquainted with the history of the effort of the city of New Orleans to adopt a system of drainage?

A. Yes, sir, to some extent.

Q. When did that effort begin?

A. There was an act in 1858, I know nothing back of '58.

Q. Has it not always been a very difficult problem to solve for engineers?

A. Difficult in the fact of there not being anything like it, yes, sir. There is no city that presents the same conditions at all.

Q. Is it a new problem in engineering?

A. Yes, sir.

Q. And the present scheme is yet a problem, one you only conclude from your own investigations and opinion it would be efficient?

A. No, sir, I would not call this plan experimental—if put in thorough execution it will surely succeed.

Q. You don't know whether it would, or not?

A. I feel confident that it would. It is based on very careful estimates of rainfall and the flow of water from the surface and the

efficiency of canals and pumps. The observation of these things, their availability now, did not exist in '58 or '71 at all, hence the problem has become more easy. Observations all over (*over*)
468 the world in the last 25 years has come in here—about the proportion of rainfall that runs from the soil and the proportion that is absorbed.

Q. And owing to these recent investigations you are now better able than you were 25 years ago, to formulate an effective plan?

A. I think so; any engineer would be.

Q. Are you acquainted with the late W. H. Bell, city surveyor?

A. Yes, sir.

Q. What was his reputation and standing as an engineer and efficient civil engineer?

A. Good.

By Mr. DE GRAY:

Q. Major, you have spoken of the present plan that is now about to be executed to drain the city of New Orleans—what is the contemplated cost of the execution of that plan as it has been adopted exclusive of the levees?

A. The estimate is about seven millions of dollars.

Q. About seven millions of dollars?

A. Yes, sir.

Q. When was that plan adopted?

A. It was adopted by the last council, I think, about two or three years ago.

Q. And is now about to be executed?

A. Yes, sir. It is now in process of execution, the contractors are at work.

Q. You give the figures that you once gave to complete the lake-shore protection levee, at $1,166,000—that was based, was it not, upon the amount of money that was provided to be paid in the act of 1871?

A. My recollection is, that that was based on my account to the comptroller's office, ascertaining the cost of what was constructed, measuring its length and prorating the incomplete part at same cost.

Q. Now, I understand from your evidence, that the amount that was provided for in that act was excessive at that time, it could have been done for about one-half?

A. I think so.

Q. Independent of any act of the legislature and independent of any cost of money that was paid for the part that was completed—how much would it have cost to have completed the uncompleted portion of the projected protection levee?

A. By the yard or in bulk?

A. (Q.) I mean in bulk. You have figured it out $1,166,000—you have put it at half of that?

A. No, sir. I put it at the price that they got for the part that was built.

Q. I say now, as a given proposition, independent of any that was

built and having already testified that they received about ⅓ more than it could be done for if paid for in cash—how much would
469 it have cost to complete this unfinished protection levee at the price you have named—wouldn't it have been one-half?

A. If they could have got it built for one-half the cost that was built for, I think it possible it would have cost one-half.

Q. According to your judgment it could have been built for one-half?

A. I think so, yes, sir.

Q. And the remark that you made about the completion of the Upper protection levee and you said it was completed near the river, it would have cost you said $50,000 independent of the act of the legislature—don't you believe that could have been completed for one-half if paid for in cash?

A. I think lower rates could have been obtained.

Q. Upon the same basis you have specified?

A. Yes, sir.

Q. Then that could have been completed for $25,000?

A. Yes, sir.

Q. Then you have mentioned the Lower protection levee, according to your calculation the uncompleted portion would have cost $1,166,80-, that is based upon the price paid for the part that was done?

A. It is based upon the rates granted by the law.

Q. What you said about that being one-half higher than what it could be done for if paid for in cash, you have estimated that that could have been completed for about one-half?

A. Yes, sir.

Q. You have been asked regarding the value of the land between the lake-shore front and the Metarie ridge on the other side—you thought it would be worth from $25 to $50 a square, that is, in its present condition?

A. Yes, sir.

Q. You don't mean to say that if that had been drained, that that land would be worth only $25 a square?

A. I mean to say that I thought its present value is what I said.

Q. Suppose it had been drained and I understand from your evidence that if this scheme had been completed the best drained land would have been between Metarie ridge and the lake?

A. A narrow strip along the banks of the canal, not any distance.

Q. What would that land have been worth if it had been drained?

A. I can't tell.

Q. You can make some approximation—a square I mean?

A. I have no idea what it would be worth, the value would have been increased.

Q. Very largely?

A. Largely.

Q. Would it have been worth $200 a square?

A. I should think not, that would be eight for one; I should think not.

Q. Well, how much?

A. Not over a hundred dollars I think; still I am not a judge of such matters, it is not my business.

470 Q. You have been familiar with this problem of drainage of the city of New Orleans for a long time?

A. Yes, sir.

Q. You are familiar with the canals which were dug and the machinery that was kept in operation operating those canals by the city of New Orleans?

A. Yes, sir.

Q. From 1876 on, say until the time that you were city surveyor and after that, what was the condition of these reservoir canals and the tail-races or the canals running from Metarie ridge into the lake?

A. The canals have at times been in very filthy condition and at times they have been cleaned out.

Q. When were they cleaned first?

A. I don't know when they were cleaned first, they were cleaned once during the administration with which I was connected.

Q. Which canals?

A. Broad, Galvez and Claiborne.

Q. Was the Orleans canal ever cleaned from the drainage machine to the lake?

A. Not that I know of. I would add to the list, the Melpomene, that was cleaned.

Q. Is it not a fact that that canal today is nearly bank full of filth and vegetable growth that retards the flow of water through it into the lake?

A. It is quite full of vegetable growth that retards the flow of water into the lake.

Q. How about the other canals leading into the lake?

A. They are covered with a heavy vegetable growth—their condition is different the one from the other; the Upper protection canal is in very good condition.

Q. Has it ever been cleaned?

A. I think not.

Q. The Lower protection, how is that?

A. The People's Avenue canal I think is in good condition.

Q. I mean the one adjoining the Northeastern R. R.

A. That is the People's.

Q. Have you ever noticed it where the Louisville & Nashville R. R. crosses?

A. Yes, sir; I have.

Q. What is its condition?

A. Its condition is bad there—I was thinking down through the ridge, it is better further down.

Q. Is it not in such a condition as to retard any flow of water through it?

A. Yes, sir.

Redirect examination.

By Mr. MILLER:

Q. You say in answer to a question of Mr. De Gray, Major,
471 that back of the Metarie ridge the space of land on each side of the canals dug there, would have been improved if it had been drained.

A. The narrow strip along just where the water drains out of the soil into the canal.

Q. I believe you have said that the best drained part of the city would have been that part.

A. If the plan had been carried out with the construction of the pumps on the lake shore, yes.

Q. How much better would it have been now, than it was when this system was started and the canals dug—what I mean to ask you is this—how much better would that land be now, than it was then, if everything had been done to complete this system?

A. Those narrow strips immediately along the banks of the canal would have been made cultivatable, but the main bulk of the swamp I don't think would have been affected a particle until they were ditched and cleared; I don't think they would have improved at all.

Q. What portion of the land would have been benefited compared to that which would not have been benefited?

A. Not over 5 %.

By Mr. GRANT:

Q. Have you ever seen the plan and specifications, the detailed plans and specifications of the city for the construction of these interior works under the act of 1871?

A. No, sir; I have never seen anything of the sort.

Q. You don't know what they were then?

A. I never could learn that there were any. I made it my business to hunt diligently for that and I never learned that there was any plan except the act and the work that was done under the laws and the ordinance of the city. I don't think there is any record of any more plan than that.

L. W. BROWN, witness, sworn on behalf of defendants, testified as follows:

Direct examination.

By Mr. MILLER:

Q. What is your profession?

A. Engineer, civil engineer.

Q. How long have you been a civil engineer?

A. Since 1874 I started in.

Q. Have you occupied any public positions in the line of your profession?

A. Yes, sir.

Q. What are they?

A. I have been assistant engineer of the city of New Orleans; also city engineer, also engineer of the Orleans levee board.

Q. What business are you in at present, engaged in?

A. At present I am engineer in charge of the third district
472 work under the Orleans levee board, also chief engineer of the National Contracting Company in the execution of the present drainage contract of the city of New Orleans.

Q. That work is being done under your supervision?

A. Yes, sir.

Q. Are you familiar with the plan or system of drainage which was prosecuted by the Mexican Gulf Ship Canal Company and Van Norden?

Counsel for complainant states that to save time he repeats the same objection offered when the preceding witness was examined, to wit, that any answer that might be given would be entirely irrelevant to any inquiry that could be raised in this case, because the plan was not the plan of the contractor or the man who was doing the work. This is a plan of the State of Louisiana in its general outlines and in detail was the plan of the city of New Orleans itself, who is defendant in this case, and whether a good plan or a bad plan is entirely immaterial, inasmuch as it is the city of New Orleans who is asked to pay for the work which was done for her according to her own directions and according to the plan which she herself promulgated and according to which she compelled the contractor to do his work.

A. I understand that the existing system that we have is the system referred to; I don't know of my personal knowledge further than what the records show, that work was done on these canals by the Mexican Gulf Ship Canal Company. I was not here, and knew nothing of it personally.

Q. What work do you speak of?

A. I speak of the work done in 1871, '2, '3, and '4.

Q. Was there any other drainage work being conducted by anybody also at that time?

A. At that time?

Q. Yes.

A. I don't know that there was.

Q. The features of that system as you know it, were what?

A. I have never been able to find it a well-defined plan, but as near as I can get at it, the system contemplated the construction of open canals in the rear of the city, in the rear of what we call the rear Claiborne street, and the construction of levees, and I understand also, or at least, as I understand, the contract which was made was an act of the legislature, which defined the work on these lines, that is, digging open canals and the construction of levees.

Q. Do you recall whether that was act 30 of 1871?

A. I think it was an act of 1871; I don't recall the number.

Q. Did the Mexican Gulf Ship Canal Company have anything to do with that work?

A. I think that is the work they done under that act.

Q. Have you examined the plan as pointed out by the act of '71—I don't mean a piece of paper, but the scheme the idea that the act of 1871 purports to represent?

A. In the investigation that I have given of the drainage
473 of the city of New Orleans I have hunted up—well, all of the information and data possible—among other things I came across are the papers in relation to the Mexican Gulf Ship Canal Company, referring especially to this particular act. The act provides for no plan that I could see, it merely provides for a contract to be entered into between the city and the contracting company, for the purpose of constructing open canals and building levees.

Counsel for complainant makes the same objection.

A. The system of drainage which we will put into execution is the result of a very thorough investigation of all the conditions existing in relation to the matter of drainage, and those investigations disclose the fact that a drainage system constructed on the plan, if it can be imagined as being the plan that was proposed, of the work that was done before, would not provide a drainage system for any section in the city of such a method or manner that is proper.

Q. What are the objections to that system that would not supply the proper drainage?

A. In the first place it was impossible for me to determine what the system contemplated. I never could find out where they proposed to place their drainage pumps, steam pumps; it was stipulated they were all to be placed along the lake front and the water to run from the front of the city to the rear and be pumped from this reservoir into Lake Pontchartrain. There exists at present four drainage stations that were there when this work was done in 1871 and 1872; those drainage stations are located about half way between the river and the lake; whether it was proposed to destroy these stations or not, I don't know.

Q. What do you say as to the number of canals provided for by the system under which the work of the canal company and Van Norden was conducted?

Counsel for complainant objects to the question because the witness has already stated that he has not seen a detail of that work.

Q. Have you enough information to answer that question? Of course, if you have not, it is very easy of settlement—you can't answer it.

A. If you refer to the canals now existing, they are totally inadequate for the drainage.

Q. By now existing do you mean what, before any new work was done?

A. Yes, sir; I mean the canals as existing since I have known them, from 1885 up to the present time.

Q. The canals that were dug and the condition of things that existed in 1885 when you first knew anything about it at all—were they, or not, sufficient to supply the city with proper drainage?

A. They were emphatically not.

Q. What were the points of objection?

A. Insufficient out-fall, insufficient machinery, insufficient
474 conveying conduits and no method at all by which the water of the higher portions of the river front which are the residence and business portions of the city could be quickly relieved from that section.

Q. What would have been necessary to have afforded that relief to the commercial and business portions of the city?

A. Proper conduits would have to be constructed to convey what water there was precipitated on the territory away.

Q. Were there any drainage canals between Claiborne street and the river?

A. There is no drainage canal between Claiborne street and Galvez street, in the section between Julia and Toulouse street, except little tail-races that existed when I first knew it, on each side of Claiborne street, from Julia street to Canal.

Q. Were such canals required to make it efficient, between Galvez and Claiborne?

A. We had to have some canals somewhere. Those canals to be convenient to receive the water and convey it conveniently to the machines. These tail-races conveyed the water but in a very slow desultory manner.

Q. Now, in 1885 when you had your first knowledge of this subject, were there any drainage canals lying between Claiborne street and the Mississippi river?

A. I will answer that question in this way. From the lower limit of the city up to Calliope street, a distance of perhaps seven miles. There is no canal between Claiborne street and the river. From Calliope street to Felicity road, a distance of perhaps of $\frac{5}{8}$ of a mile there is the Camp Street ditch, it was called then, which has been since culverted now, which is connected with the Claiborne canal by the Melpomene canal on Melpomene street, which extends from Claiborne street to Camp street, a distance of about one mile and $\frac{1}{4}$. There was a canal in '85 constructed on Nashville avenue extending from Claiborne street towards the river to, I think, Prytania street, just across Saint Charles, that was there in '85.

Q. Who built it?

A. I don't know, I understood it was the Mexican Gulf Ship Canal work.

Q. What would be the effect of drainage, of there being no canals between Claiborne street at the points where you have mentioned there were none?

A. The drainage of course, the artery being ever so small would, of course, do some good to relieve some water, but didn't relieve sufficient water to keep the territory from inundation from a very small rainfall, which is demonstrated.

Q. What is the character of the land lying between Metarie ridge and Lake Pontchartrain?

A. It is all swamp land, wholly undrained.

Q. What is the character of the land lying between Claiborne street and the river?

A. The majority of it is built up.

Q. How?

475 A. It is our most improved section of course for commerce and residents occupy this section of the city.

Q. This drainage as you found it in '85, provided, or not, for the different disposal of storm water and polluted water?

A. I have never known of but one place for the disposal of the drainage of the city of New Orleans.

Q. That was what?

A. Lake Pontchartain.

Q. The effect of discharging in Lake Pontchartrain, polluted water with storm water, would be what?

A. In the investigation we made of this whole matter of drainage, we consider it a very unsanitary measure.

Q. Serious or ordinary?

A. If you are going to pollute the water with sewage, it would be very serious.

Q. Is there any means of carrying that off after being discharged into Lake Pontchartrain?

A. When you discharge into Lake Pontchartrain, you are discharging practically into the sea and the objection of discharging into Lake Pontchartrain, is that Lake Pontchartrain is a land-locked body of water. It is 20-odd miles wide and 40 long, it has merely two openings connecting with the sea and has practically no tide.

Q. Taking the system of drainage as you found it existing in 1885, would that furnish an efficient and proper drainage to the city of New Orleans?

A. No, sir.

Q. Will you please state in brief why it would not?

A. For reasons previously stated and further—the system was not planned and designed I would judge, to provide the city of New Orleans with a drainage system which would answer all her requirements and satisfy her increasing demands in this line for any great length of time. When we plan a system of drainage and spend large sums on it, it should be done on lines anticipating a further growth for a period of years.

Q. The system devised by the city of New Orleans and now under process of construction by the company of which you are chief engineer is calculated upon to give the city proper drainage?

A. It has been very carefully designed with the idea of meeting all the requirements of the drainage of the city for a great many years to come.

Q. What are the points in favor of that system in comparison to that found in 1885?

A. The system provides first, for the rapid delivery, immediately the rain falls on any section, into properly constructed sewers to properly convey that water away from that locality which delivery to be delivered by proper machinery properly proportioned to a

proper outfall, all of which means that there would be no inconvenience occasioned by inundation.

476 Q. Were any of those purposes accomplished by what you found in 1885?

A. No, sir.

Cross-examination.

By Mr. GRANT:

Q. Do you know anything about the history of the investigations by engineers to provide a plan for the drainage of the city of New Orleans and how far those investigations and efforts have extended in the past?

A. Yes, sir; I am very familiar with that particular point.

Q. When did the city of New Orleans first begin to inquire about formulating a plan of drainage?

A. I might refer to the appendix in connection with this report, which gives a history of the drainage of the city of New Orleans. The earliest report that I have found is that of Louis H. Pilie in 1857.

By Mr. DE GRAY: There was something earlier than that.

A. As early as March, 1835, a charter was granted for a period of 20 years to what was known as the New Orleans Drainage Company, its object was to drain and reclaim by means of canals, the upper limits of the suburb Livaudais. The next was in '58, '59, '61 and '71, the legislature enacted laws relative to the subject and appointed commissions. In 1858 act 165 was passed which related to the drainage of the city of New Orleans. Act 179 of 1859, authorized a bond issue for the drainage and the act 57 of 1861 provides for assessments for drainage purposes and the mode of collection. In 1868 Mr. Surgi made quite a detailed report to the city council in relation to the drainage. In 1869, under ordinance 1148, there was a board of engineers appointed by the city of New Orleans to investigate this system of drainage. This was quite an important board. The board was composed of Braxton Bragg, A. G. Blanchard, Richard J. Evans, John Roy, H. C. Brown, G. W. R. Bayley, L. Surgi and J. A. D'Hemecourt. Nothing came of it. That is, no work was done under their report. Act 30 of 1871, authorized a contract to be entered into by the city of New Orleans with the Mexican Gulf Ship Canal Company. The work done by the Mexican Gulf Ship Canal Company, as I say here, in 1871, '72 and '73, was carried out under what was known as the Bell plan.

Q. Mr. Bell was the city engineer at that time?

A. He was city engineer.

Q. Then from the earliest data which you can furnish, it appears that the city of New Orleans has from time to time investigated drainage and tried to adopt some scheme for the relief of the city of New Orleans, but without effect, until the plan was adopted by Mr. Bell, city surveyor, which you say here was perfected?

A. I say that my investigations show that the city has from time

to time, during the last forty and fifty years, made various efforts looking towards the proper drainage of the city of New
477 Orleans; that she did in '71, '72 and '73 do some work on that line, but she did not ever complete a thorough system of drainage for the city of New Orleans.

Q. Is it not true that the question of proper drainage for the city of New Orleans is not only a novel one, but a very difficult question for engineers to solve?

A. We have always considered that an intricate problem. I began investigations of the drainage of the city of New Orleans in 1886, and have been identified with it ever since. In 1892 I was elected city engineer, and one of my first efforts after I was city engineer was to get the council to appropriate the necessary funds for a topographical survey, which I did get and which was the *the* first money that had been appropriated for this investigation. I will add for history, that in 1888, after I had investigated the drainage for three years, I had prepared an outline plan of drainage and the New Orleans Auxiliary Association, who took a lively interest in drainage at that time, and I remember meeting for the first time Major Harrod, when we first discussed this matter very thoroughly. In 1888 Major Harrod was elected city engineer and I was elected his assistant, and he and I worked hard to secure funds from the council and also from the legislature to prosecute this investigation, which we both said was an absolute essential proceeding, before anything in the shape of actual work could be done or be begun. In 1892 we secured this appropriation of $17,500 to start the topographical survey. This expenditure was the starting of the present plan of drainage as now adopted and for which a contract has been let.

Q. Is it not true that during the last 25 years the data upon which engineers are enabled to act in matters of drainage has become very much more extensive in value than it was prior to that time, and thus enabling engineers to act more intelligently than they did 25 years ago?

A. There are some laws governing drainage which, of course, are old as colleges; for instance, the flow of water and velocity we are going to get for a given volume to a given fall and a given hydraulic radius—that problem is old, but it has only been by the experience of the last 30 or 40 years, that the proper co-efficient roughness to use in proportion to the banks of a stream, whether masonry or earthwork, the levees we call it, has been secured. Then further, it has been recent years that we have put within reach for this scientific investigations the Cairo gauge of precipitation of out-fall; I refer to our improved measuring text for measuring precipitation from the clouds, as also out-fall from the drainage machines. So I can sum it up, that while in the last 25 years there has been large improvements made to facilitate the engineer in arriving at what should be a proper system of drainage for any city, as also during the past 25 years a very large amount of experience has been gained which is of great value, yet the original principle, that water won't flow up a hill, or won't flow up a level, has always been known.

478 By Mr. DE GRAY:

Q. While you were connected with the city surveyor's office of the city of New Orleans, what was the general condition of the various canals that had been dug prior to that time, and of the drainage machines?

A. The condition of these canals varied according to the number of times the city cleaned them out. The canals, as you know, occupy a flat territory or are located in a flat territory, and only when the machines run is there any slope at all in the water; consequently they fill very quickly, and they should be cleaned out quite often, and when the canals are not cleaned out often they, of course, make bad carriers for water, bad conveyors.

Q. The out-fall canals, for instance, the Orleans canal, that is a very important out-fall canal?

A. Yes, sir.

Q. What has been the general condition of that canal as long as you have known it?

A. The question of an out-fall canal, it is a canal which we get something through.

Q. What has been the condition of that canal as to sediment and vegetable growth in the canal, regarding and interfering with the discharge of the water?

A. I have now profiles of that canal which show that the canal is not so largely filled up except near the drainage machines.

Q. Isn't it true that as you go down to the Spanish fort, that that canal is filled with vegetable growth to a very great extent?

A. Portions of it now, is largely filled up with lillies, and there is not a stream in the State hardly, that is not filled with these lilies.

Q. Isn't the Lower protection canal in bad condition, the canal inside of the Lower protection levee?

A. There is no canal inside the Lower protection levee, you mean the Upper protection levee?

Q. I mean the Lower—do you know the bank along which the Northeastern railroad runs?

A. You refer to Florida walk, that is what we call that now. The Lower protection canal as I understand you to mean, is the People's Avenue canal, extending from the lake to Florida walk with the Northeastern railroad on its embankment.

Q. That is exactly what I mean—what condition is that canal in?

A. That canal has never been dredged, to my knowledge. It is like all canals opening into the lake, it is a shallow bayou, I mean the mouth has never been dredged; two or three years ago I sounded the canal for the purpose of bringing a dredge through it and, with the exception of the mouth, found ample water. I may mention that this canal has not been used for the purpose of drainage, to my knowledge, since 1885, and at present it has a dam built across it.

Q. How about the Broad Street and the Hagan Avenue canal and the Galvez canal and the Poydras canal—haven't those canals at various times while you have been connected with the engineer's department been bank full with vegetable growth?

479 A. They have been so full that there is scarcely any room to convey the water; they are practically that way today.

Q. And have been ever since you have known them?

A. Except at times, right directly after we cleaned them and for reasons I have stated they fill very quickly.

Q. Mr. Brown, you believe that, with your system of drainage, the one concerning which you have spoken of, that it will thoroughly drain and reclaim the land through which it runs and where the canals are placed, it will drain the city of New Orleans?

A. Yes, sir; that is its object.

Q. Would that increase the value of the land?

A. Necessarily it must.

Q. To what extent would you say this would increase the value of the land between Metairie ridge and the Claiborne canal?

A. That is pretty hard to say. I might mention as an instance that I live right in that section; it is right in the bottom of a basin, say Broad street and Canal; under present conditions I am affected this way: I make my gas with a motor and in order to take care of the apparatus I have a pit under the house; now, every time we have a rain that fills the Broad Street canal just bank full, that pit fills with water. Now, with a good system of drainage it would keep that water down and if only one foot below the surface and I would not be affected.

Q. Do you own the house you live in?

A. Yes, sir.

Q. How much did it cost you?

A. That is pretty hard to say. We have owned the house for a great many years. I paid $4,500 when I bought it, the house and lots.

Q. How many lots have you?

A. I have three lots.

Q. How long have you been living there?

A. I have been living there 11 years.

Q. And during the whole of that time, notwithstanding this insufficient drainage which has heretofore existed, and notwithstanding the fact that this is the lowest land on this side of Metairie ridge, you still continue to live there all the time?

A. Certainly, because I can't sell it; I want to sell it but I can't.

Q. The same conditions existing now, existed when you bought it; you were not compelled to buy it?

A. I only put the motor in a couple of years ago.

Q. You were not compelled to buy it?

A. No, sir.

Q. You knew the conditions when you went there?

A. Not as well as I do now, but still I would buy the same property today.

Q. Isn't it a fact that the property around you is improved and that there are dwellings in that vicinity notwithstanding this land is low?

A. Unquestionably. The growth of the city has forced improve-

ments. If we had the proper drainage St. Charles avenue
480 would improve a great deal more. I think the assessments on real estate will show how property has depreciated and gone up at times.

Q. Is it not true when you came to that point, that the property of New Orleans has depreciated and come up at times, even at Canal street?

A. Yes, sir; there are changes from one cause or another affecting the price of property.

Q. How far are you from Claiborne street?

A. I am a mile beyond Claiborne street, right in the bottom of the basin.

Q. What is, under the present condition of things a fair price of property per lot, in that low land, a foot or more below the level of Lake Pontchartrain?

A. You refer to the property I am in?

Q. Property anywhere near you, adjoining you, in that locality?

A. I really don't know; I paid for my property $1,000 for the lots and I paid $3,500 for the house.

Q. Your lots are how big?

A. 38 feet front by 160 feet deep.

Q. You are a mile west of Claiborne street?

A. Yes, sir; practically.

Q. Is that swamp land?

A. No, sir; not now.

Q. Why is it not now swamp land?

A. For the reason that it is built upon and improved and the water is kept away.

Q. By what?

A. By the Bienville drainage machine, but kept away improperly, as I told you.

Q. But, if kept away, I presume that is all that is necessary; whether it is kept away improperly or not is another question—you don't care whether it is kept away properly or improperly provided the water don't flood you?

A. Yes, sir; because I am often flooded; under the present conditions I have had 8 or 9 inches of water in my yard.

Q. For how long?

A. Sometimes for three or four days, depending on the condition of the machines.

Q. What is the condition of the various drainage machines in the city of New Orleans?

A. At present time, they are perhaps in good order, better than they have been for the last 15 years; they have been put in order by the present drainage commission.

Q. What were they prior to 15 years ago?

A. Ever since I have known them, the Melpomene and Bienville drainage machines, they were always what I considered bad machines, in bad repair, constantly requiring attention.

Q. And insufficient in design?

A. I won't say that. The London Avenue and Dublin Avenue machines are much better machines.

Q. You have spoken of swamp land lying between, I be-
481 lieve Claiborne street and the river, of there being large areas of swamp land between Claiborne street and the river?

A. No, sir; I did not.

Q. Do you mean to say that there is swamp land between Claiborne canal and the river—I mean generally?

A. I said there is no land between Claiborne canal and the river which was not subjected to drainage to a more or less extent.

Q. That is to say, it was receiving the benefits of drainage more or less?

A. Yes, sir.

Q. But not as thoroughly as you think it will be by your present plan?

A. No, sir.

Q. But you think it is insufficiently drained in some places?

A. Yes, sir.

Q. You never heard of anybody being drowned in that section, have you?

A. No, but in a city of the importance of New Orleans, we don't want such a drainage that will let people get drowned or even get their feet wet.

Q. A great deal has been said in this case about the cost of money that was expended under what we have called the "Bell system" under the provisions pursuant to the act of 1871, the sum total of which is about a million and a half in round numbers—how much is it estimated that the system which you have devised in connection with others which is now being executed, will cost?

A. The work that was done under the former contract embraces but a very small area of the city.

Q. That is not what I asked you—I asked you how much the estimate is of the present plan that is now being executed.

A. That cannot be answered except——

Q. I want to know the estimated cost of the present system now being executed; you can answer that?

A. I will answer it my way.

Q. Answer the question that I asked you; I just want to know what is the estimated cost of the plan of drainage of the city of New Orleans that is now being executed or about to be executed.

A. Including all the work contemplated, which is mainly underground construction, eight millions of dollars.

By Mr. MILLER:

Q. These lilies that you speak of as being in some of these canals—is there any way of getting them out?

A. There has been lots of science employed to get rid of them, but no effective measures have been adopted or reached.

Q. They are a natural growth?

A. They are something that developed here about four or five years ago.

Q. There is no way of dealing with them at all?

A. No, sir.

482 Q. This Florida Walk Canal levee that you speak—how far is that above the United States barracks?

A. You refer to the People's Avenue canal?

Q. The one that you spoke of as Florida walk.

A. It does not reach anywheres near in the neighborhood of the United States barracks.

Q. Well, how far away from there is it?

A. About three or four miles.

Q. How far from the division line between New Orleans and the United States barracks?

A. About the same distance.

Defendants offer in evidence a statement showing issue of gold bonds to drainage-warrant holders, from May, 1872, to December 31st, 1874. This statement is a duplicate of the statement contained in the printed record of Peake against The City of New Orleans, No. — of the docket of this court, found on pages from 423 to 425. Marked —.

Testimony of George Guinault, Marked "Defendant P 4."

Filed January 17, 1898.

United States Circuit (Court), Eastern District of Louisiana.

JOHN G. WARNER
vs.
CITY OF NEW ORLEANS.

Testimony taken in the above numbered and entitled cause on behalf of defendants on the 13th day of December, 1897, before H. J. Carter, Esq., special examiner, under order of court and reported by R. H. Carter, stenographer.

Appearances.

B. K. Miller, Esq., for City of New Orleans.
S. L. Gilmore, for City of New Orleans.
R. De Gray and Wm. Grant, for complainants.

GEORGE GUINAULT, witness, sworn and examined on behalf of the defendants, testified as follows:

Direct examination.

By Mr. MILLER:

Q. What is your position?

A. I am chief clerk of the mortgage office.

Q. That is where encumbrances against property are recorded in this parish?

A. We record all encumbrances against property.

Q. What has been the custom of the mortgage office about reporting drainage taxes?

483 A. We report all drainage taxes unless it is cancelled in the mortgage office.

Q. What is the effect on the conveyance of property?

A. That is to say, if it is not paid?

Q. If it is not paid.

A. We leave it on the certificate.

Q. Does it give the person a clear title?

A. No, sir; it has always to be clear of encumbrances.

Q. In order to be clear, it has to be paid?

A. Yes, sir; or erased.

Q. That question arises whenever there is a conveyance or a mortgage?

A. Yes, sir.

Q. That has been the custom of the mortgage office for how long?

A. I am in the office for over 20 years and it has always been the custom.

Q. These drainage taxes are recorded in the office, how?

A. By judgment.

Q. Several judgments, several series of them, are they not?

A. The judgment of 1861.

Q. And others?

A. And others, by recording from one judgment to another, reinscription.

Cross-examination:

Q. Isn't it a fact that a great many encumbrances have been erased by judgment of court?

A. By prescription by judgment of court.

Q. What do you mean by prescription by judgment of court?

A. Because they go to court and prove they are over ten years.

Q. No, not that——

A. We won't cancel them otherwise except by judgment (of) court.

Q. Don't they go to court and prove that the property has not been benefited?

A. In some cases.

Q. For instance, take the Davidson case; you know all about that case?

A. Yes, sir.

Q. Wasn't it erased because it was shown that the property had not been benefited?

A. It was not benefited because it was in the swamp.

Q. Isn't it true that in the majority of cases, the drainage tax was erased because it was proven that the property was not benefited?

A. In some of the cases.

Q. The most of them?

A. I can't say the most; in a great many cases they have been canceled by prescription also.

Q. Isn't the rule now, that when the cases are fought in court, the drainage tax is erased; isn't that the settled rule now?

484 A. That is the settled rule now by prescription; that is the court rule; they are settled in court at present to give them the benefit of prescription.

Q. Before that they were erased because of the fact that the property had not been benefited?

A. In both instances, by prescription and——

Q. First, but——

A. Because it had not been benefited.

Q. Hasn't that rule been followed since the Davidson case?

A. Yes, sir.

Defendants offer in evidence the record of Peake against The City of New Orleans, No. — docket of this court, wherein a receiver of the drainage tax was appointed.

Continued until Tuesday at 2 o'clock.

Testimony of P. A. Rabouin, for Defendant, Marked Def'd't P 5.

Filed January 17, 1898.

United States Circuit Court, Eastern District of Louisiana.

JOHN G. WARNER
vs.
CITY OF NEW ORLEANS. } 12350.

Testimony taken in the above numbered and entitled cause on behalf of the defendants, The City of New Orleans, on the 24th day of December, 1897, before Henry J. Carter, Esq., special examiner, and reported by R. H. Carter, stenographer.

Appearances.

B. K. Miller, counsel for City of New Orleans.
S. L. Gilmore, city attorney, for City of New Orleans.
R. De Gray & Wm. Grant, counsel for complainant.

* * * * * * *

P. A. RABOUIN, witness, sworn on behalf of defendant, testified as follows:

Direct examination.

By Mr. MILLER:

Q. What is your occupation?

A. At present, city comptroller.

Q. Have you in your possession as comptroller, any of the assessment-rolls, books, or records of any kind relating to the drainage tax?

A. No, sir.

Q. Do you know who has?

A. They are now in the hands of a receiver appointed by this court.

485 Q. Who is that?

A. Mr. Fontain.

Q. Who gave him possession of them?

A. The keeper of the archives of the city.

Q. In whose custody were they before being turned over to Mr. Fontain?

A. In the custody of the keeper of the archives, temporarily, for a short while.

Q. And before that?

A. They were in my custody.

Q. When did you put them into the archive department of the city hall?

A. I can't remember the day.

Q. Well, about?

A. It is certainly six months ago, if not more.

Q. You have now nothing of that kind in your possession as comptroller?

A. No, sir.

Q. Was a receipt taken from Mr. Fontain for what he got?

A. The keeper of the archives must have a receipt.

Q. It is filed away in the archives where the books were before?

A. Yes, sir.

Q. Will you get us a copy of that?

A. Yes, sir; I will try.

Counsel for defendant offers in evidence the receipt of the keeper of archives, to be produced, marked —.

Defendant offers in evidence the record of James W. Peake against The City of New Orleans, No. — of the docket of this court, in which a receiver for the drainage tax was appointed.

Testimony of Mrs. M. Pohlman and Juste Fontain, Jr., for Defendant, Marked Def'd't P6.

United States Circuit Court, Eastern District of Louisiana.

JOHN G. WARNER *vs.* CITY OF NEW ORLEANS. } No. 12350.

Testimony taken in the above numbered and entitled cause on the 29th day of December, 1897, on behalf of defendant, before H. J. Carter, Esq., special examiner, appointed under order of court, and reported by R. H. Carter, stenographer.

Appearances.

B. K. Miller, Esq., counsel for defendant.
S. L. Gilmore, Esq., counsel for defendant.
R. De Gray, Esq., and Wm. Grant, Esq., counsel for complainant.

* * * * * * *

486 Mrs. M. POHLMAN, witness sworn on behalf of defendant, testified as follows:

Direct examination.

By Mr. MILLER:

Q. Do you occupy any official position in the city of New Orleans?
A. Yes, sir.
Q. What is it?
A. I am custodian of the city archives.
Q. As custodian of the city archives did you, at any time, have possession of the books, papers, and other records relating to the matter of drainage taxes?
A. Yes, sir.
Q. Have you in your possession at this time those records and books?
A. No, sir.
Q. In whose possession are they?
A. Mr. Fontaine, Jr.'s.
Q. Did you take a receipt from Mr. Fontaine when you turned over these records to him?
A. Yes, sir.

(Witness produces receipt referred to.)

Q. Does this include all the books and records concerning the drainage taxes which you had?
A. Yes, sir; these were all the books I had in the archives.
Q. As custodian of the city archives what have you possession of?
A. You refer to this record?
Q. No; generally.
A. I have possession of all records that come from the city.
Q. You have no drainage records left?
A. No, sir; I turned over all of them.
Q. Is this receipt the original or a copy?
A. It is the original.
Q. You need this, then, as a voucher?
A. Yes, sir.
Q. Have you a copy of this?
A. Yes, sir.

(Witness produces a copy.)

Q. Did you make this?
A. Yes, sir.

Counsel for defendant offers in evidence copy of receipt testified to by the witness in lieu of the original, which — returned to the witness to be kept as a voucher for the records turned over.

No cross-examination.

487 *Receipt Marked Pohlman "1."*

List of drainage records taken from city archives March 25th, 1897.

5 ledgers.
7 index.
4 record minute books, etc.
8 books of plans.
7 assessment-rolls 2d district.
7 assessment-rolls 3d district.
2 4th draining district.
7 draining sections.
2 cash books.
4 4th draining district, city of New Orleans.
10 3d draining district.
3 journals.
1 draining assessment.
1 Report of the Superintendent of the U. S. Coast Survey, 1859.
1 2d draining district, 1 to 400 bonds and coupons cancelled.
1 subdivisional plans 2d draining district, vol. 1.
1 register of drainage collections from July 1st, 1876.
1 register of bonds, 2d district.
1 bills paid in 2d drainage district.
1 bills collected 2d draining district.
1 collections of ass'm'ts 1st drainage dist.
1 2d draining district assessment bills 1st instalment, 1861.
1 assessment bills collected by A. S. Phelps.
1 special entre of receipts on property, etc., Jan'y, 1874.
1 drainage tax, 1873.
1 collections 1864.
1 Citizens' Bank of Louisiana, 2d draining district.
1 collections 1875.
1 cash book 64 to 71.
1 old book miscel.
14 packages drainage papers.
1 map.

JUSTE FONTAINE, JR., witness sworn on behalf of defendant, testified as follows:

Direct examination.

By Mr. MILLER:

Q. Mrs. Pohlman, the custodian of the city archives, has just testified that she turned over to you all the books, records, papers and documents relating to the drainage tax which were in the city archives—did you get them?

A. Yes, sir.

Q. I show you a copy of the receipt signed by yourself. (Counsel exhibits to witness receipt referred to.) You received all those papers described there?

A. This is not signed, but I did sign one like that.
488 Q. Same kind of paper?
A. Yes, sir.
Q. In what character did you receive those books, etc.?
A. I received them as the receiver of the drainage fund for the city of New Orleans.
Q. By the appointment of what court?
A. Judge Pardee, I believe appointed me.
Q. Of the United States circuit court?
A. Yes, sir.
Q. When were you appointed?
A. I was appointed on the 13th or 15th of March more than a year ago.
Q. What have you done as receiver since then?
A. I have used my best endeavors to collect the drainage tax. I have collected about $79 and some few cents. I have disbursed in the neighborhood of $18 or $19.
Q. Have you, or not, used diligent efforts to collect all you could?
A. Yes, sir; more than diligent efforts.
Q. You think you could have done any better than you have done?
A. No, sir; I do not.
Q. Well, do you think anybody else could have done any better?
A. No, sir; I do not.
Q. You are still acting as receiver?
A. Yes, sir.

By Mr. GRANT:

Q. You don't think you can make any collections to amount to anything?
A. No, sir.

Certificate of the clerk of the supreme court of Louisiana as to decree of said court in case of Succession of Patrick Irwin on opposition to account, etc., marked "Defendant O 1."

Filed Jan. 17, 1898.

UNITED STATES OF AMERICA,
State of Louisiana.

Supreme Court of the State of Louisiana.

Succession of PATRICK IRWIN on Opposition to Account. No. 7824.

I hereby certify that the decree rendered by this court on the 10th day of January, 1881, in the case entitled Succession of Patrick Irwin, on opposition to account, No. 7824 of the docket of this court, became final and executory on the 14th day of February, of the same year by reason of the rehearing having been refused on that day.

In testimony whereof I have hereunto set my hand and affixed

the seal of said court, at the city of New Orleans, this the
489 twenty-ninth day of December, A. D. one thousand eight hundred and ninety-seven, and in the one hundred and twenty-second year of the Independence of the United States of America.

[SEAL.] (Signed) T. McC. HYMAN, *Clerk.*

Certificate of the clerk of the supreme court of Louisiana as to the judgment rendered in the case of Henrietta Davidson *v.* City of New Orleans and writ of error, etc., marked "Defendant Q 2."

Marked Defendant M.

UNITED STATES OF AMERICA,
State of Louisiana.

Supreme Court of the State of Louisiana.

HENRIETTA DAVIDSON
vs.
CITY OF NEW ORLEANS. } No. 8260.

I hereby certify that the judgment of this court in the case of Henrietta Davidson *vs.* City of New Orleans, No. 8260 of the docket of this court, was rendered on the 16th day of January, 1882; that a rehearing of the case was refused on the 13th March of the same year, and that subsequently a writ of error was prosecuted in the Supreme Court of the United States so far as the books of this office show, and may still be pending.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at the city of New Orleans, this the twenty-ninth day of December, A. D. one thousand eight hundred and ninety-seven, and in the one hundred and twenty-second year of the Independence of the United States of America.

[SEAL.] (Signed) T. McC. HYMAN, *Clerk.*

Copy of act of sale of dredge-boats, etc., by the Mississippi & Mexican Gulf Ship Canal Company to Warner Van Norden, passed November 22d, 1872, before A. Hero, notary public, marked "Defendant R."

Included in the record of the former appeal already printed. Not to be copied here, as per agreement.

Circuit Court of the United States, Eastern District of Louisiana.

JAMES W. PEAKE
vs.
THE CITY OF NEW ORLEANS. } No. 12008. In Equity.

Bill of Complaint.

Filed May 30, 1891.

To the judges of the circuit court of the United States for the eastern district of Louisiana:

James Wallace Peake, of the city of New York and a citizen of

the State of New York, brings this, his bill, on his own be-
490 half as well as on behalf of all other parties holding obligations of the same nature and kind as your orator, or obligations that are susceptible of being reduced to the same nature and kind as your orator who may intervene for their interest herein and may contribute to the costs and expenses, and agree to pay their share of the counsel fees herein against the city of New Orleans, a municipal corporation of the State of Louisiana, and a citizen of said State.

And thereupon your orator complains and says:

That, under the act of the legislature of the State of Louisiana, approved March 18, 1858, a scheme was provided for the drainage of certain portions of the parishes of Orleans and Jefferson, through the instrumentality of certain drainage commissioners who were to levy certain taxes upon the territory described in the act, and which was to be divided into certain districts, and whose duties, powers and obligations are more fully set forth in said act, which is made part hereof.

And your orator further shows that thereafter further acts, supplementary and amendatory of the above act, *was* duly passed by said legislature, to wit, act No. 191 of March 17, 1859, and act No. 57 of the year 1861, and act No. 30 of 1871, all of which are made part hereof.

And your orator further shows that the commissioners provided for in said act No. 165 of 1859 were duly appointed, qualified, and entered upon the discharge of the duties of their offices in the first and second drainage districts, levied assessments and instituted the proceedings thereon, called for by said acts, and procured the homologation of the assessment-rolls called for by said acts and finally levied execution upon various pieces of property on said judgments of homologation aforesaid and bought the same, and also took a surrender of various other pieces of property in satisfaction of the drainage taxes imposed thereon, but the exact details and description of which are unknown to your orator, and are fully and in detail known by the defendant, and all of which land so purchased by said commissioners, as well as that surrendered to them was so bought and surrendered and held by them, under and pursuant to the acts of the legislature aforesaid, and in trust for the creditors of the drainage fund by said acts of the legislature of the State of Louisiana created.

Your orator further shows that pursuant to act 30 of 1871, hereto annexed as aforesaid, all the rights, duties, obligations and property of the aforesaid drainage commissioners passed from them to the city of New Orleans, and said act, among other things, directed that all property received by said city of New Orleans should be held in trust for the payment of the Mississippi & Mexican Gulf Canal Company, which was the contractor provided by said act to do the drainage work therein provided for.

And your orator further shows that among the property that passed under the above act, in trust as aforesaid, to the said city of New Orleans, as aforesaid, were a great number of squares of land

situated in the rear of the city of New Orleans, and bordering
491 on Lake Pontchartrain, bounded by said lake, Upper Line canal, Metairie ridge, Gentilly ridge and People's Avenue canal.

Your orator further shows that he is the owner of a certain judgment, based on three drainage warrants issued under act 30 of 1871, for drainage work done under said act, all dated July 9, 1875, and numbered Nos. 115, 116 and 122, with interest at 8 per cent. per annum, from date until paid, which was duly rendered on May 9, 1887, in suit No. 10810 on the docket of this court, payable out of drainage funds, on which execution has been duly issued and returned *nulla bona* after due demand, as will more fully appear by reference to said suit, judgment, execution and return, all made part thereof.

Your orator further shows that although said city of New Orleans received said canals and property from said drainage commissioners in the year 1871, she has never sold or disposed of them, but still holds the same and declines and refuses to pay your orator and the other creditors of said drainage, or to take any steps for the collection of the drainage taxes, or otherwise to pay the debts due for drainage, or wind up or execute said trust.

And your orator further shows that a receiver is necessary and proper to take charge of all the property and assets belonging to said trust, and sell and dispose of the same for the benefit of the creditors thereof.

To the end, therefore, that the trust created by act 30 of 1871, and the other acts of the legislature of the State of Louisiana, hereinbefore referred to, may be closed up and all the assets and property thereof may be sold, and the proceeds of sale be applied to the payment of the creditors of said fund; may it please your honors to appoint a receiver to take possession and charge of the property and assets of every nature and kind, real, personal or mixed, now held and possessed by said city of New Orleans, under and pursuant to said acts of the legislature of the State of Louisiana, to wit: act No. 165 of 1859, No. 191 of 1859, No. 57 of 1861, and act No. 30 of 1871, and under the direction of the court to sell and dispose of the same and apply the proceeds of said sale to the payment of the creditors of said drainage fund, and may it further please your honors to grant your orator a writ of subpœna, directed to the City of New Orleans, therein and thereby commanding said city on a day certain therein to be named and under a certain penalty, to be and appear before this honorable court, then and there to answer, but without —, which is waived, all and singular the premises, and to stand to, perform and abide such order, direction and decree as may be meet and agreeable to equity and good conscience; and your orator, as in duty bound, will ever pray.

(Signed) RICHARD DE GRAY,
CHARLES LOUQUE,
Solicitors for Complainant.

492

J. W. PEAKE
vs.
CITY OF NEW ORLEANS. } No. 12008.

The motion for the appointment of a receiver in this cause having come on to be heard, and the solicitors for the respective parties having been heard thereon, now, on motion of Charles Louque, solicitor for the complainant, it is ordered by the court, the Hon. E. C. Billings, presiding, that J. W. Gurley be and he is hereby appointed receiver of all the property, equitable interests, things in action and effects of the drainage fund, held by the defendant, The City of New Orleans, in trust, and vested with all the rights and powers of a receiver in chancery, according to law and the rules and practice of this court, upon his filing with the clerk of this court a bond for the faithful performance of his duties as such receiver, in the penal sum of $2,000.00, and the approval thereof by this court.

And it is further ordered that the said defendant appear before A. G. Brice, Esq., master in chancery of this court, at such time or times and place as he may designate, and execute and deliver to said receiver, an assignment, assigning, transferring and conveying to him all the aforesaid property, equitable interests, things in action and effects, and all books, papers and vouchers, relating thereto, and that the city appear before such master, from time to time, as said master shall require, and submit to such examination as said master shall direct in relation to the said property and effects, and the condition thereof.

And the said complainant or the said receiver shall be at liberty to apply to the court, from time to time, for such further order or direction as may be necessary.

June 13, 1891.

(Signed) EDWARD C. BILLINGS, *Judge.*

Answer.

Filed November 26, 1892.

J. W. PEAKE
vs.
CITY OF NEW ORLEANS. } No. 12008.

This defendant, now and at all times hereafter, saving and reserving to itself all and all manner and benefit and advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties and imperfections in said bill contained, for answer thereto, or to so much thereof as this defendant is advised it is material for it to make answer thereto, answering, says:

That in 1858, the legislature of the State of Louisiana passed an act, No. 165, approved March 18th, 1858, entitled "An act to provide for the leveeing, draining and reclaiming swamp lands in certain portions of the parishes of Orleans and Jefferson."

493 That thereafter the legislature of the State of Louisiana passed the following acts, duly approved, namely: Act No. 191 of 1859, act No. 57 of 1861, and act No. 30 of 1871, for the purposes in the said acts set forth.

That assuming to act by authority of act No. 165 of 1858, and of the other acts just enumerated, the commissioners thereunder provided for proceeded to lay assessments and levy drainage taxes, and failing to collect the same, to sell certain property in the drainage districts, and that if title to the same was duly acquired by the commissioners and their successors, it passed in turn to the city of New Orleans in the capacity of statutory trustee, by the proper officers of the city; and respondent makes part of its answer the several acts herein referred to.

And respondent further shows that in the case of the Succession of Irwin, 33 Louisiana Annual Reports, page 63, the supreme court of Louisiana, held act 30 of 1871 to be unconstitutional as to the fourth drainage district, and the assessments themselves to be null and void; and so, too, it was held by the supreme court of Louisiana, to the like effect, in the matter of the board of administrators, praying, etc., 34 Louisiana Annual Reports, page 97. And respondent further shows that in accordance with the decision in the Irwin case, it was likewise held by the supreme court of Louisiana, in the case of State *ex rel.* The Mississippi and Mexican Gulf Ship Canal Co. *vs.* The City of New Orleans *et als.*, 35 Louisiana Annual Reports, page 68, that the city of New Orleans was not liable for assessments, and judgments therefor, claimed to have been rendered under and in conformity to said acts 57 of 1861 and 30 of 1871.

And respondent further shows that the *ratio decidendi* of the supreme court of Louisiana in the Irwin case is of direct application to and must control in the cases of all the drainage districts, and particularly the first, second and third drainage districts; that act 57 of 1861 is unconstitutional for like objections thereto with those maintained by the supreme court of Louisiana in the Irwin case; and that this court will follow the same decisions, as being the interpretation of the statutory law of Louisiana by the highest court of the State. And respondent further shows that act 57 of 1861 is repugnant to and in violation of article 115 of the constitution of Louisiana of 1852, and the proceedings thereunder, and by which certain property was seized under execution, sold, and bought in by the drainage commissioners, or othe-wise surrendered to the drainage commissioners, were null and void.

And respondent further shows that in the case of Davidson *vs.* The City of New Orleans, 34 Louisiana Annual Reports, page 176, the supreme court of Louisiana held that where drainage works are shown not to have benefitted the lands assessed, the assessment against them is uncollectable and null. And respondent further shows that the doctrine of the supreme court of Louisiana in the Davidson case isapplicable to and ought to control in the greater part of the first and third districts, and almost the wh ole o

494 the second district. That the drainage works have been abandoned, and benefit to the property proposed cannot be seen and traced, and in the presence of the facts it is against good conscience and equity to enforce the judgments based upon said assessments.

Respondent further shows that act 51, of 1869, was intended to repeal, and actually did repeal act 57, of 1861, and for this reason, additional to those already assigned by respondent, proceedings under said act 57 of 1861, after the passage and approval of act 51 of 1869, were null and void, and it was not competent by means of such proceedings to convey title.

And respondent further shows that under none of the acts hereinbefore mentioned was any authority conferred on the board of commissioners or on the board of administrators to assess the city of New Orleans on its streets and public places, and that all assessments for drainage against said city, on its streets and public property, were null and void, and that it is not competent to make any conveyance of property based upon said assessments and upon said proceedings, and that if any such have been made that the same are null and void.

But respondent further shows that if the court should, notwithstanding the premises, hold that any part or parts of the land pretended and assumed to be designated in complainant's bill of complaint, passed to respondent, then respondent shows that the same did so pass to respondent only in respondent's fiduciary character as statutory trustee of the drainage fund, involuntarily burdened therewith, and that respondent can be dealt with herein, and treated by the complainant in no other capacity whatsoever.

And, further answering, respondent shows that complainant's bill of complaint, where it sets forth that among the property that passed under the acts of the legislature hereinbefore recited, were a great number — squares of land situated in the rear of the city of New Orleans and bordering on Lake Pontchartrain, bounded by said lake, Upper Line canal, Metairie ridge, Gentilly ridge and People's Avenue canal, furnishes no description whatsoever of the lands in question, and respondent further shows that all transfers of land are of public record, and are accessible to the complainant, and that when he lays claim, as he does in these proceedings, charging, as he also does, that respondent is compellable to transfer title to the said lands to the receiver herein, complainant is clearly bound to furnish particulars with reference to said lands and a due description thereof, and to point out where they are situated, and what the measurements thereof may be, and otherwise to give respondent such information and notice in relation thereto as may suffice to put respondent upon its proper defence.

And, further answering, respondent admits that on May 9, 1887, complainant, in suit No. 10010 of the docket of this court, obtained judgment, based upon drainage warrants, for six thousand dollars, with eight per cent. interest thereon from July 9, 1875, and costs of suit, payable out of said drainage fund, and that execution issued

thereon, which was returnable *nulla bona*, as appears by reference to said judgment, execution and return.

495 And further answering, respondent denies that the city of New Orleans ever received lands except by the transfer of such title as the drainage commissioners had, which has been declared null by the supreme court of Louisiana, and shows that the said city of New Orleans has done all in its power to collect the drainage taxes, and discharge all duties under the legislation hereinbefore recited, but that said collection has been made impracticable by the said decision of the supreme court of Louisiana, and respondent discharged from all responsibility in the premises by said decisions and by the decision of the Supreme Court of the United States in Peake *vs.* City of New Orleans, reported in 139 U. S. Reports, pages 349 to 361.

Further answering, respondent shows that upon the application by complainant to this court for the appointment of a receiver, as in complainant's said bill of complaint is more fully set forth, the mayor and council of the city of New Orleans, resolved on the 9th of June, 1891, that they deemed it unadvisable that the city should petition this court for the administration and liquidation of the drainage fund, and suggested that the city attorney be instructed to that end.

And respondent further shows that upon a rule taken herein, the court appointed J. W. Gurley, Esq., receiver, and that said Gurley has qualified under said appointment, and that respondent has never opposed and does not now oppose his entering upon the discharge of his duty as receiver, but only requires that his gestion in office should be confined to the trust property, if any there is, resulting from the drainage trust, and none other, and that the said receiver should not take and possess the same in detriment to, and destruction of respondent's rights as a creditor of the drainage fund as determined by the U. S. Supreme Court in the case of Peake *vs.* City, reported in 139 U. S. Reports, pages 249 to 351.

Further answering, respondent shows that the city of New Orleans advanced $1,600,000 to the drainage fund, in bonds of the city, and is a creditor of the drainage fund for hundreds of thousands of dollars, as appears by reference to the decision of the Supreme Court of the United States in said case of Peake *vs.* City of New Orleans, being the same parties now before the court, and which decision and opinion of the Supreme Court of the United States is made part of this answer, and respondent hopes it may have the benefit of said decision now and at all times, as if it had availed itself thereof in the form of a plea; and respondent shows that it is entitled to hold all the assets and property acquired by it under the legislation hereinabove referred to, if any there are, until the amount of this indebtedness, which was incurred for the benefit of said drainage fund, shall be returned to the city, and respondent shows that it has a lien upon the said assets and property wherever the same may be found, and that respondent ought not to be compelled to deliver said assets and property, if any there are, until the disbursements so made by respondent for the benefit of the drainage fund

shall be repaid, and that no conveyance to the receiver ought
496 to be ordered by the court until respondent has been reimbursed the amounts so paid out by it, as aforesaid.

But should the court hold otherwise, and decree that respondent ought to deliver to the receiver the said assets and property, then respondent prays that the decree directing the said delivery may reserve all of respondent's rights, and that respondent be recognized as a preferred creditor of the drainage fund for the amount of $800,000.00, or whatever other amount in excess thereof may be shown due to your respondent by said fund, with first lien and privilege and right of pledge in favor of respondent upon the said fund and moneys realized and to be realized from debts due the same.

And this respondent denies all and all manner of unlawful combination or confederacy, wherewith it is by the said bill charged, without this, that there is any other matter, cause, or thing in the complainant's said bill of complaint contained, material or necessary for this respondent to make answer unto, and not herein well and sufficiently answered, traversed and avoided or denied, is true to the knowledge or belief of this defendant; all which matters and things this defendant is willing and ready to aver, maintain and prove as the court shall direct; and this defendant being a municipal corporation, makes this its said answer under its corporate seal the attest of said seal, and the mayor of the city of New Orleans, keeper of said seal, as witness the impress of said seal, and the signature of Joseph A. Shakspeare, mayor of the city of New Orleans; and humbly prays to be hence dismissed, with reasonable costs and charges in this behalf most wrongfully sustained.

[SEAL.] (Signed) JOS. A. SHAKSPEARE, *Mayor.*
H'Y RENSHAW,
Ass't City Att'y, Solicitor for Respondent.
CARLETON HUNT,
City Att'y, Solicitor for Respondent.

NOTE.—The bill, answer and order appointing receiver in foregoing cause are to be copied in lieu of the entire record; and for stipulations as to the other parts of the record, see agreement at page 53 of this transcript.

"DEFENDANT T 1."

Filed January 17th, 1898.

MAYORALTY OF NEW ORLEANS,
CITY HALL, *Sept.* 13, 1871.

(No. 1093, administration series.)

An Ordinance to Provide for a Settlement of the Debts of the Late Drainage Districts.

SECTION 1. Be it ordained by the council of the city of New Orleans. That the administrator of public accounts be author-

497 ized to settle the following claims and accounts or so much of the same as may be found correct, upon the approval of the mayor and administrator of finance, by the issue of certificates as hereinafter provided:

First Drainage District.

1. Warrant of the board of commissioners of the first drainage district No. 352, May 13, 1871, in favor of James D. Hill on the treasurer of the board for five thousand dollars, signed N. E. Bailey, president, and L. Laroque, secretary, per resolution No. 152, authorizing this payment for services as attorney of the board to May 18, 1871 ..... $5,000.00

(This warrant appears to have been issued in consequence of a suit of Mr. Hill against the board for professional services in favor of the board against the Ship Island Canal Company, and is accompanied with extracts from evidence of Geo. S. Lacy, Esq., and General Harry T. Hayes, supporting Mr. Hill's claim.)

2. Cash advances to board of commissioners by J. Davidson & Hill, at various dates to June 2, 1871, for sundries. Correct per report of treasurer of board of commissioners annexed..... 1,202.19

Second Drainage District.

1. Bill of Kearney, Blois & Co., January 11, 1869, for oil for draining machine. Approved by R. G. Latting, chairman of finance committee; Mr. Eastman, superintendent, and in pencil J. L. G..... 77.55
2. Bill of J. L. Gubernator & Co., from January 11, 1869, to April 13, 1869, for bricks, lumber, wood and hauling machinery. Approved by Latting & Eastman 2,080.53
3. Bill of Bredge & Son, January 31, 1869, for cement furnished for machine, between January 1, 1869, and March 31, 1869. Approved with 8 % interest from June 1, 1869, by R. G. Latting, chairman finance committee. Mr. Eastman, superintendent, and in pencil J. L. G..... 662.40

A subsequent bill for interest from March 31, 1869, to May, 1871, on the above ($662.42) was presented by Bredge & Son, and approved by Mr. Eastman, superintendent, for..... 114.83

4. Bill of Fellows & Mills for fees in suits contradictory with Ship Island Canal Company, dated March 1, 1870. Approved by Moses Eastman, superintendent, and J. L. Gubernator, *pro tempore* of finance committee; the latter approval subsequently erased. 500.00
And for balance of fees in same suit..... 1,000.00

(No approvals or vouchers with these two items of $500 and $1,000.)

5. A bill of Geddes, Shakespear & Co., foundry work, castings, etc., for machine, dated September 15, 1870; articles furnished between February 15, 1869, and March 13, 1869. Items sworn to by John Geddes. Amount of bill approved by Moses Eastman, superintendent..... 1,523.74

There is a claim for interest on this bill from March 13, 1870, at five per cent. per annum until paid.

6. Bill of Field & Bell, dated February 28, 1871, for coal furnished in January and February, 1871, as approved by Moses Eastman, superintendent, and J. L. Gubernator, chairman finance committee.... 611.00
7. Bill of Wingfield & Bridges, dated March 1, 1871, for coal in January and February; approved by Moses Eastman 213.00
8. Bill of Field & Bell, dated March 31, 1871, for coal; approved by Moses Eastman, and J. L. Gubernator, chairman finance committee..... 240.00
9. Bill of C. Roselius, dated March, 1871, for salary as attorney for board for 1868, 1869 and 1870, at $500 per annum 1,500.00
And balance of fee for services contradictory with Ship Island Canal Company, both items approved by Moses Eastman, superintendent, and J. L. Gubernator, chairman *pro tempore* finance committee, the latter signature subsequently removed..... 1,000.00
10. Bill of Alexander Walker, dated May 9, 1871, for services in suits contradictorily with Ship Island Canal Company and B. Bloomfield in fifth, seventh and eight district courts, and in the supreme court, and with Lockwood & Brott in sixth district court and before Recorder Houghton..... 5,000.00
11. Bill of J. L. Gubernator & Ferry, dated May 15, 1871, for three years' storage on three boilers and one heater; approved by Moses Eastman, superintendent, and William T. Mayo, secretary, etc..... 180.00

99

2. Bill of John Clark, for draining wheel erected under contract, at the Dublin Avenue or Fourteenth Street machine, and certain foundry work beside..... 5,602.07
Interest on the same thirty months at 8 %..... 1,120.00

The bill has no approval inscribed on it, but it is accompanied with copy of contract.

Third Drainage District.

1. Ch. G. de Lisle offers a survey of this district, comprising all the squares bounded by the Mississippi river, St. Peters St., Bayou St. John, Lake Pontchartrain and Lafayette avenue, forming a work of ten volumes, strongly bound..... 1,000.00

SECTION 2. Be it further ordained, etc., That said certificates shall be issued upon the approval of the mayor, administrator of finance and the acceptance of the parties interested, shall bear the date of their issue and interest from such date to final settlement at the rate of seven per cent. per annum upon all sums unpaid. They shall be numbered in the order of their acceptance after approval, in a separate series for each drainage district as heretofore existing and paid in such order from the assets collected from such drainage district or section.

SECTION 3. Be it further ordained, etc., That the mayor and administrator of finance, aforesaid, shall have power to compromise all questions incidental to a final settlement of the foregoing claims and enter into an agreement necessary thereto for the interest of the city, and to present litigation; provided no part of this ordinance shall be taken or construed as acknowledging on the part of the city the validity of any claim or part of a claim not found correct or approved by the mayor and administrator of finance, adopted by the council of the city of New Orleans, September 12, 1871.

Yeas: Cockrane, Shaw, Lewis, Walton, Bonzano.

(Signed) BEN. F. FLANDERS, *Mayor.*

MAYORALTY OF NEW ORLEANS,
CITY HALL, *Dec.* 20, 1897.

I hereby certify that the above ordainance No. 1093, administration series, is a true and correct copy of the original on file in this office.

[SEAL.] (Signed) R. L. TULLIS,
Secretary of the Mayor.

500 "DEFENDANT T 2."

Filed Jan'y 17, 1898.

MAYORALTY OF NEW ORLEANS,
CITY HALL, *January* 10, 1872.

No. 1301, administration series.

An Ordinance to Provide for the Payment of Certain Certificates Issued under Ordinance No. 1093, *Administration Series.*

Be it ordained by the council of the city of New Orleans, That the administrator of public accounts warrant on the administrator of finance for the payment out of funds collected or to be collected for drainage of the respective districts named, of the following certificates:

First district certificate No. 1.	L. Laroque.....	$ 163.20
Second district certificate No. 1.	J. L. Gubernator & Co..	2,079.80
Second district certificate No. 2.	J. L. Gubernator & Ferry.	180.00
Second district certificate No. 3.	Wingfield & Bridges...	213.00
Second district certificate No. 4.	John Clarke.....	6,722.07
Second district certificate No. 5.	Field & Bell	800.00
Second district certificate No. 6.	Geddes, Shakespeare & Co.	1,728.21
Second district certificate No. 7.	Bridge & Son.....	807.96
Second district certificate No. 8.	Kearney, Blois & Co....	97.50
Third district certificate No. 1.	C. G. De Lisle.....	1,000.00

Adopted by the council of the city of New Orleans, January 9, 1872.

Yeas, Cockram, Shaw, Delassige, Remick, Lewis, Ronzano.

BENJ. F. FLANDERS, *Mayor.*

A true copy.

H. CONQUEST CLARK, *Secretary.*

MAYORALTY OF NEW ORLEANS, *Dec.* 20, 1897.

I hereby certify that the above ordinance, No. 1301, administration series, is a true and correct copy of the original on file in this office.

[SEAL.] (Signed) R. L. TULLIS,
Secretary to the Mayor.

Defendant T. 2.

501

JOHN G. WARNER
vs.
CITY OF NEW ORLEANS.

Extracts of Record

In the case of Henrietta Davidson *et als. vs.* City of New Orleans, in the civil district court, parish of Orleans, No. 25555.

Filed January 17th, 1898.

STATE OF LOUISIANA,
Parish of Orleans.

Civil District Court for the Parish of Orleans.

HENRIETTTA DAVIDSON ET AL.
vs.
CITY OF NEW ORLEANS. No. 25555.

Third District Court.

Petition.

Filed January 9th, 1879.

To the honorable third district court for the parish of Orleans:

The petition of Mrs. Henrietta Davidson, testamentary executrix of the succession of John Davidson and natural tutrix of Mary S. and Alexander Davidson, and widow in community of the late John Davidson, and the petition of Elizabeth J. Davidson, wife of Charles R. Bailey, and of said Bailey herein appearing to aid and authorize his wife and of Charles M. Parks, and of John Davidson, emancipated and dispensed from attaining the age of majority, by judgment of the honorable second district court—all residing in this city except Charles Parks, who resides in North Carolina, respectfully shows, that under the provisions of act 165 of 1858, the boards of commissioners of the first, second and third draining districts, were created for the avowed purpose of levy-ing, draining, and reclaiming the swamp lands in the parishes of Orleans and Jefferson. That said boards of commissioners were required, when they were prepared, to drain their respective districts, to cause a plan thereof to be made, accurately designating the limits of the districts and subdivisions of the property therein contained, and the names of the proprietors, as also the dimensions and directions of the canals to be dug, and the place where the steam-engines were to be placed. The plans were required to be deposited in the office of the recorder of mortgages and published, and were made the basis of all the future proceedings looking to the collection of the assessments hereinafter mentioned. The said publication was required to state the cost of the work proposed, and the time within which the draining was to be completed; said publication was made a summons or citation of the owners named, on which—as on a foundation all future

proceedings rested. That in 1859, said plans were deposited
502 and publication made, and the cost designated for the first draining district was $350,000 and the time designated for the first draining district within which the work was to be done, was three years from that date. That the assessment of property was required to be upon the superficial foot, and in such amount and no more, as would be necessary to do the work, not exceeding $350,000 in any one district.

Now your petitioners show that the rate of assessment is not uniform by an ad valorem rate, nor by the superficial foot in the three districts; but that it is three and three-tenths of a mill in the first district, and two mills in the second and third. No work was done under these laws, save in the first and second districts. The city and commissioners have already collected more than $350,000 in the first district, and the said district is not drained, although more than twenty years have elapsed since the work was begun. No bonds were issued and no money borrowed under the amendatory act of 1859, except $10,000.00 which have since been repaid in said first district. Petitioners show that in 1871, the city of New Orleans having succeeded to the rights of the several boards of draining commissioners filed tableaux of assessment in the seventh district court, entitled "In the matter of the Commissioners of the First Draining District, praying the homologation of the assessment-roll," etc., that the judge of said court rejected said petition, but on appeal the supreme court reversed said judgment, and decreed that said roll be approved and homologated, and this approval and homologation shall operate as a judgment against the property described as assessed in said roll, and also against the owner or owners thereof, with ten per cent. In addition to the amount assessed, to pay costs and counsel fees. And by operation of law the said record was transferred to the superior district court, and thence to this honorable court. Now, your petitioners show that the only basis of, or reasons why, said unequal and not uniform assessment of three and three-tenths mills could be claimed against property, was that property drained would be benefited by the proposed works, so as to be increased in value at least the cost of the work assessed, else that property to the extent of the difference between the increased value and the cost of the work assessed to it, would be taking it from the owner for a purpose of public utility, without adequate compensation previously made as provided by the constitution. Now, your petitioners show that under act 30, 1871, sec. 9, all the assets and rights of the drainage commissioners, which boards have been abolished in 1869, were transferred to the mayor and administrators of the city of New Orleans, and a private corporation, the Mississippi and Mexican Gulf Ship Canal Company, was charged with the work of making the levees and canals to effect the drainage. That under certain powers of attorney and acts of pledge or transfer from said company, one Warner Van Norden claimed the right to do said drainage work under said act. Now, your petitioners show that since the judgment of the supreme court, aforesaid, was rendered,

503 that all the work of draining the swamp in the rear of the city has been abandoned entirely; the dredge-boats and machinery have been removed and advertised to be sold by the city of New Orleans; that the charter of the said Mississippi and Mexican Gulf Canal Company, has been judicially forfeited for insolvency, and the said company is hopelessly and largely insolvent and entirely unable to complete the drainage.

That Warner Van Norden is insolvent and unable to complete or go on with the drainage work, and they have both long since abandoned it. That the city of New Orleans is also insolvent. That her yearly expenses exceed her receipts by a large amount, and she is unable to carry on the current expenses of her municipal administration, still less is she able to go on and complete the drainage. That the legislature recognizing these facts, passed an act, No. 16, p. 35, 1876, to enable the city of New Orleans to assume exclusive control of all the drainage work, and to buy out all the rights of said company, and its alleged transferee, which was shortly thereafter done; and recognizing the further fact that the whole scheme had proved abortive, especially as to those lands lying north of the Metairie ridge, towards Lake Pontchartrain; and that said lands, after twenty years, had not been drained, and that the work had been abandoned, and most of the said lands could not be drained except at a cost exceeding ten times their value, and fivefold what would be their value after drainage; and that the only valuable portion of said lands is drained naturally; the legislature passed act 48, 1877, by which all laws or parts of laws providing for the drainage of lands in the parishes of Orleans and Jefferson, be and they are hereby repealed so far as they provide for the drainage of lands within the following lines: Commencing at the intersection of the Metairie ridge with the Upper protection levee along said ridge to the New Orleans canal, to the Metarie road, thence along the Metarie road to Bayou St. John, thence along the Bayou St. John to Marigny avenue, thence along Marigny avenue to Bayou Sauvage, thence along Bayou Sauvage to People's avenue, to Lafayette avenue, thence along Lafayette avenue to the river. Your petitioners show that there is within the lines mentioned in said act, north of the Metairie road a tract of land mostly swamp, containing about four hundred acres or over sixteen million superficial feet, known as the Allard place, lately belonging to John Davidson, deceased, whose succession your petitioners have inherited and represent, which tract has never been drained at all either by the drainage commissioners or by the city of New Orleans; and so far from draining it the city of New Orleans has made a ditch and thrown up large banks of earth by which the natural stream is destroyed and notwithstanding said facts and said statutes the city of New Orleans claims from petitioners, and as a privilege on the lands, the property of petitioners, to the amount of over fifty thousand dollars, and the city has recorded a large claim for drainage assessments which she claims to be a privilege and mortgage on the property of petitio ners That the amount of the judgment aforesaid claimed agains

504 the property of petitioners exceeds the sum of five hundred dollars, to wit: by the certificate annexed the sum of $2,691. The value of the lands assessed, to wit: the tract known as the Allard place does not exceed five thousand dollars without the building thereon; and even if it were drained, its value would not exceed ten thousand dollars without the buildings and improvements thereon, and whereas after the lapse of twenty years since the drainage projected it has not been drained and its drainage has been abandoned, it is illegal and against good conscience and equity to enforce any judgment or claim against your petitioners for drainage. It would not only take from petitioners said property without any compensation, but other property without any purpose of public good being subserved, and an enforcement of said judgment would also be contrary to the true intent and meaning thereof and against the letter of the act of the legislature, No. 67, 1877, as well as of secs. 7, 8 and 9 of the act of 1858.

Petitioners show that since the only consideration of said claim and of said judgment was the proposed public benefit to be obtained by the drainage of the lands in the rear of the city and that the grounds upon which an onerous and unequal assessment was made upon said lands, was because of the enhancement in value that they would undergo by reason of the drainage; it being assumed by the legislature and the court that the land when drained would be worth much more than the cost of the drainage. Since these considerations have utterly failed, the lands not being drained and the work abandoned with legislative sanction, it would be against equity and good conscience to enforce said judgment as a privilege against the lands, and above all as a personal judgment against petitioners. Petitioners further show that in the second district where the lands have been drained, they would have paid their assessment in full, amounting to several thousand dollars, but that all the lands of petitioners in the first drainage districts between the Mississippi river and the Metairie ridge were already drained and the expense thereof paid under the old drainage act of 1835; that no benefit has accrued to said lands south and southeast of Metairie ridge, or can accrue from drainage of the swamp lands north of the ridge, nor their value be enhanced in such a way that three and three-tenth mills per superficial foot would be any correct measure or proportion of such increased value. Petitioners aver that more than enough money and values have been voluntarily paid to the drainage commissioners and the city of New Orleans to pay for all the work honestly and fairly done; that the whole consideration of the enforced contract made by the State for and between the drainage commissioners or the city of New Orleans and the owners of property as to the drainage thereof, has utterly failed; that for all the work done in the first drainage district settlement has been made in cash or gold bonds or premium bonds, to pay which the property of petitioners throughout the city is annually taxed, and it is unequal and unjust to make petitioners pay twice for the same pretended and unjust claim; that since the first of January, 1875, only $3,000 of drainage warrants for work done in the first drain-

age district have been issued, and the city has received over
505 $75,000 in cash, collected from property in the first drainage district towards paying said warrants, and furthermore holds property taken for drainage assessments in said district bought at the price of $167,605.10, said amount being taken from the following parties in entire satisfaction of their drainage tax, being one-half their swamp property in said district, while the other half was released from all claims, to wit:

The heirs of Lavergne	$2,667.49
Heirs of Genois	7,741.97
The Society for the relief of Destitute Orphan Boys	33,489.90
Female Orphan Asylum	38,741.30
The Milne Asylum for Destitute Orphan Boys	38,390.63
The Milne Asylum for Destitute Orphan Girls	34,501.37
Charles D. Moran	12,042.74

That it is unequal to take from the owners of so large an amount of swamp property only one-half thereof to pay for draining the whole and at the same time to take from petitioners all their swamp property and a great deal more besides, to pay for draining the swamp property taken away.

The value of the property of petitioners in said draining district exceeds the sum of fifty thousand dollars. Petitioners show that the heirs of Mr. John Davidson were not parties to said proceeding in the late seventh district court, and that Mr. John Davidson was dead at the time.

Wherefore, petitioners pray that an injunction issue enjoining and restraining the City of New Orleans, its agents and attorneys from attempting to execute or carry into effect said judgment in the matter of the Commissioners of the First Draining District, late of the seventh district court, and now of the records of this honorable court, or from seeking to enforce any privilege or mortgage against any lands of petitioners on account of any drainage claims in the first draining district, and that the City of New Orleans be cited to appear and answer this petition, and after due proceedings there be judgment perpetuating the injunction and annul ing the said judgment and decreeing that the city of New Orleans has no legal claim, privilege or mortgage on any lands of petitioners for drainage or otherwise, and that all inscriptions for drainage privilege or mortgage be cancelled and erased, and the recorder of mortgages be ordered to erase the same at the cost of the city, and if for any cause this relief be denied that said drainage claims and privileges claimed by the city be restricted to the specific property as to which it was assessed, and decreed not to be personal debt against any of your petitioners, and for costs and for general relief.

(Signed) B. R. FORMAN,
(Signed) H. N. OGDEN,
Attorneys for Pet'n'rs.

506 *Affidavit.*

Mrs. Henrietta Davidson and Elizabeth J. Bailey, being sworn, say that the allegations of the foregoing petition are true and render an injunction necessary, and unless an injunction issue as prayed, petitioners will suffer an irreparable injury.

(Signed) HENRIETTA DAVIDSON.
(Signed) ELIZABETH J. BAILEY.

Sworn to and subscribed before me this 7th day of January, 1879.
(Signed) W. J. CASTEL, *Not. Pub.*

Exception to Jurisdiction.

Filed Jan'y 20, '79.

Third District Court.

HENRIETTA DAVIDSON ET ALS. *vs.* THE CITY OF NEW ORLEANS. } No. 25555.

And now before the court comes the City of New Orleans, and by way of exception to the jurisdiction of this court, she shows:

That in and by judgment of the supreme court of the State of Louisiana, referred to in plaintiffs' petition, the assessment-roll of the first drainage district was duly homologated and approved; the assessment against the succession of John Davidson, and against the property referred to in said roll, and in plaintiffs' petition as belonging to him, were fully recognized and maintained; and a personal decree granted, for the full amount of such assessments, "against the property described as assessed in said roll, and also against the owner or owners thereof, with ten per cent. in addition to the amount assessed, to pay costs, and counsel fees."

That upon writ of error to the Supreme Court of the United States, the judgment of the State court aforesaid, was affirmed in all its parts; and remanded for due execution thereof;

And that each and both of the aforesaid judgments have become definitive and final, and possess the force and effect of a thing adjudged.

Further this appearer shows, that it is not within the jurisdiction of any of the inferior courts of the State of Louisiana to annul and set aside a final and definitive judgment, or decree, of the highest court of appeal in that State, duly affirmed by a final and definitive judgment, or decree of the Supreme Court of the United States, should plaintiffs' action be regarded as not having been brought to annul the judgment, but merely to regulate its effect, which, however, this appearer alleges cannot be done, the cognizance of such an action belongs exclusively to the second district court of the parish of Orleans, in which court the succession of John Davidson was

opened, and is now being administered upon, by Henrietta
507 Davidson, one of the petitioners, as testamentary executrix of her deceased husband.

Wherefore, and for such other causes as the law may authorize this appearer excepts to the jurisdiction of this honorable court, and prays to be hence dismissed, with her costs, in this behalf expended.

(Signed) SAM'L P. BLANC,
Assistant City Att'y.

Exception "No Cause of Action" and Plea of "Res Adjudicata."

Filed Jan'y 20, 1879.

Third District Court.

HENRIETTA DAVIDSON ET ALS.
vs.
THE CITY OF NEW ORLEANS. } No. 25555.

Should the exception to the jurisdiction of the court be overruled, then, and in that event, but not otherwise, the City of New Orleans, comes before the court and shows the same—

That all the matters and things set forth and contained in plaintiffs' petition, have been fully inquired into, and finally determined, or might have been inquired into and determined, by the judgment of the supreme court of the State of Louisiana referred to in plaintiffs' petition, and the judgment of the Supreme Court of the United States, affirming in all its parts the judgment of the State tribunal aforesaid.

That the judgments aforesaid possess and have the force and effect of *res adjudicata.*

Further she shows that if it be true, that any part or portion of plaintiffs' demand is not embraced nor affected by the exception of *res adjudicata,* or by the judgment aforesaid, which, however, this appearer does not admit, then and in that event, this appearer says, that such part or portion of the petition fails entirely to disclose, or set forth, a legal cause of action; more particularly that part or portion wherein plaintiffs set up, and rely upon, act No. 48 of the General Assembly of the State of Louisiana for the year 1877.

That the aforesaid statute divests vested rights, and impairs the obligation of a contract, it is, therefore, in violation of article 110 of the constitution of the State of Louisiana for the year 1868, and section 10, article 1 of the Constitution of the United States, and cannot form the basis of a legal cause of action; and further, said act is in violation of art. 118 of the State constitution, destroying all equality and uniformity.

Wherefore, appearer prays that this exception may be sustained, and that plaintiffs' petition may be dismissed at their costs.

(Signed) SAM'L P. BLANC,
Assistant City Attorney.

508 *Amended Exception of No Cause of Action.*

Filed Feb'y 13th, 1879.

Third District Court.

HENRIETTA DAVIDSON ET ALS. vs. THE CITY OF NEW ORLEANS. } No. 25555.

And now before the court comes the City of New Orleans, and leave of court being first obtained, she shows the same: That the entire petition herein filed, fails to disclose a good and sufficient cause of action, more particularly that part or portion of it wherein the said plaintiffs set up, and rely upon, act No. 48 of the sessions of the General Assembly of the State of Louisiana held in the year 1877, and act No. 67 of the same sessions.

The aforesaid statutes divest vested rights, and impair the obligation of a contract created by act 30 of the year 1871; that the said acts destroy uniformity and equality in taxation; and for these, and other reasons, are in violation of articles 110 and 118 of the constitution of the State of Louisiana, for the year 1868, and sec. 10, article 1, of the Constitution of the United States.

Wherefore, this appearer excepts to the whole of plaintiffs' petition, for want of cause of action; and prays that the same may be dismissed at plaintiffs' costs.

(Signed) SAM'L P. BLANC,
Assistant City Att'y.

(Signed) LACEY & BUTLER, *Of Counsel.*

Order.

Let the amended exception be allowed and filed as within prayed for, and according to law.

New Orleans, February 13th, 1879.

(Signed) F. A. MONROE, *Judge.*

Submission.

Extract from Minutes.

WEDNESDAY, *March 12th*, 1879.

Third District Court.

HENRIETTA DAVIDSON ET AL. vs. THE CITY OF NEW ORLEANS. } No. 25555.

Present: Hon. F. A. Monroe, judge.

The exceptions herein were called up, counsel for all parties being present.

509 When, after hearing additional argument of counsel, the matter was submitted, with leave to furnish authorities on or before Saturday next.

Opinion of the Court.

Filed May 6th, 1879.

Third District Court.

HENRIETTA DAVIDSON ET ALS. *vs.* CITY OF NEW ORLEANS. } No. 25555.

On the exceptions.

The ground- for nullity and for injunction set up in the petition are properly divisible into two classes, to wit:

1. Those which might have been and for the most part were, urged in the defence of the original action, the judgment which is enjoined and sought to be annulled.

2. Those based upon matters arising or developed since the rendition of the judgment enjoined.

It is well settled that defences available in the original action do not authorize an injunction or action of nullity unless the nullity be absolute in its character, and particularly must this be held to be the case when the judgment sought to be annulled in a district court has been rendered by the supreme court of the State and affirmed by the Supreme Court of the United States as in the case at bar—2 La., 15; 6 A., 799; 14 A., 575; 5 N. J., 664; 4 A., 231.

As to these matters alleged to have arisen or to have been developed since the rendition of the judgment in question, the court is convinced that it is without jurisdiction in this case, since the enforcement of the said judgment is by law confided exclusively to the probate court, 29 A., 118.

If it should be claimed that the judgment in question has been paid, there can be little doubt that the proper place to set up such a defence to its enforcement would be the court vested by law with the power to enforce it and in opposition to such enforcement.

So in the case presented, whether the judgment has been emasculated by act 48 of 1877, or by the failure to prosecute the work contemplated by said judgment, are equally, and in the opinion of the court alone, cognizable in the court in which, and by the authority of which the execution of said judgment is to be effected, the question raised (now under consideration) not affecting the validity of the judgment as rendered.

The exceptions herein filed are therefore maintained, and this suit dismissed, as in case of nonsuit, at the cost of the plaintiffs.

510 *Judgment.*

Rendered May 6th, 1879.

Third District Court.

HENRIETTA DAVIDSON ET ALS. *vs.* CITY OF NEW ORLEANS. } No. 25555.

For the reasons assigned in the written opinion of the court this day delivered and filed:

It is ordered, adjudged and decreed that the exceptions herein filed be maintained, and that this suit be dismissed as in case of nonsuit at the cost of the plaintiffs.

Judgment rendered May 6th, 1879, and signed May 10th, 1879.

(Signed) F. A. MONROE, *Judge.*

Motion of Appeal.

As Entered on the Minutes Tuesday, May 13th, 1879.

Third District Court.

HENRIETTA DAVIDSON ET ALS. *vs.* CITY OF NEW ORLEANS. } No. 25555.

On motion of B. R. Forman, att'y for plaintiffs, and on showing to the court that there is error to their prejudice in the final judgment herein rendered 6 May, 1879, and signed 10 May, 1879,

It is ordered that each and all of the plaintiffs be allowed a suspensive appeal therefrom returnable to the supreme court on the first Monday of November, 1879, and the amount of the bond be fixed at two hundred and fifty dollars.

Appeal Bond.

Filed May 19th, 1879.

Third District Court.

HENRIETTA DAVIDSON ET AL. *vs.* CITY OF NEW ORLEANS. } No. 25555.

Know all men by these presents, that we, Mrs. Henrietta Davidson, testamentary executrix of the succession of John Davidson and natural tutrix of Mary S. and Alexander Davidson, and as widow in community of the late John Davidson and Elizabeth J. Davidson and Charles H. Bailey, her husband, and Charles M. Parks and John Davidson, as principals, and Alexander Hill, as surety, are

511 held and firmly bound unto Benjamin Armbruster, clerk of the third district court for the parish of Orleans, his successors, executors, administrators and assigns, in the sum of two hundred and fifty dollars, for the payment whereof, we bind ourselves, our heirs, executors and administrators, firmly by these presents.

Sealed with our seals, and dated in the city of New Orleans, on this 19th day of May, in the year of our Lord one thousand eight hundred and seventy-nine.

Whereas, the above-bounded pl'ffs this day filed a motion and order of appeal from a final judgment rendered against them in the matter of Davidson, *et als.*, *vs.* City of New Orleans, No. 25555, in the third district court for the parish of Orleans, on the 6th day of May, 1879, and signed on the 10th day of May, 1879:

Now, the consideration of the above obligation is such that the above-bound principals shall prosecute their appeal, and shall satisfy whatever judgment may be rendered against them or that the same shall be satisfied by the proceeds of the sale of their estate, real and personal, if they be cast in the appeal; otherwise that the said Alexander Hill shall be liable in their place.

(Signed) H. N. OGDEN, *Att'y for Pl'ffs.*
(Signed) HENRIETTA DAVIDSON, [L. S.]
Tes. Exc., etc.
(Signed) ELIZABETH J. DAVIDSON. [L. S.]
(Signed) CHAS. H. BAILEY. [L. S.]
(Signed) CHAS. M. PARKS. [L. S.]
(Signed) JOHN DAVIDSON. [L. S.]
(Signed) ALEXANDER HILL. [L. S.]

Decree of the Supreme Court.

Filed Nov. 30th, 1880.

Supreme Court of the State of Louisiana.

CLERK'S OFFICE, NEW ORLEANS, *Nov. 15th*, 1880.

HENRIETTA DAVIDSON ET AL. *vs.* CITY OF NEW ORLEANS. } No. 7613.

Appeal from the 3rd district court for the parish of Orleans.

Mr. Justice FENNER—

Deliver- the opinion and decree of the court in the words and figures following, to wit:

This case arises under the drainage laws and comes before us now exclusively upon exceptions, for the proper determination of which it is necessary to state the substance of a long and complicated petition.

The averments are substantially, and so far as necessary to be stated for our present purpose, as follows:

512 That by act 165 of 1858 the legislature established certain draining districts for the purpose of leveeing, draining and reclaiming the swamp lands therein situated, and created boards of commissioners for each of said districts and defined their powers and duties, amongst which were the duty to make plans designating the drainage work to be done, the limits of subdivisions of property within the districts, the names of the proprietors, the probable cost of the work proposed, and the probable time within which the work would be completed; that the said plans, when completed, were to be deposited in the office of the recorder of mortgages, and were to be published; that in 1859, such plans were deposited and published, and the cost therein estimated was $350,000 for the first drainage district, and the time fixed for completion of the work was three years; that after such publication, the boards of commissioners were authorized to levy such uniform assessments upon the superficial square foot of lands within each district as may be necessary to defray the work not exceeding $350,000; and that the board for the first drainage district did assess a tax of 3.3 mills per superficial foot on the lands of that district; that more than $350,000 have been collected in said district, and that, though more than twenty years have elapsed since the work was begun, the district has not been drained, that in 1871, the city of New Orleans, having succeeded to the rights and powers of the several boards of draining commissioners, filed tableaux of assessments in the seventh district court in a proceeding (authorized by act 57 of 1861) entitled "In the matter of the Commissioners of the First Draining District, praying the homologation of the assessment-roll, etc.;" that the petition was rejected in that court, but that, on appeal, the supreme court reversed the judgment and decreed that said roll be homologated and that this homologation shall operate as a judgment against the property described and also against the owner or owners thereof with 10 % additional for costs and counsel fees, that the only reason, basis or consideration for said assessment or the judgment thereon was, that the land had been, or should be, drained, and that, when drained, the land would be benefited thereby so as to be increased in value at least the cost of the work or amount of the tax assessed; that since the judgment aforesaid, the city of New Orleans, now lawfully vested with exclusive control of all the drainage work, has entirely abandoned it, and has removed and advertised for sale the dredge-boats and machinery, employed in the work; that the legislature, recognizing that a certain portion of the lands embraced in the drainage districts had not been and would not be, drained, had passed act No. 48 of 1877, which repealed all drainage laws providing for the drainage of the lands lying within the limits therein defined, and cancelled all judgments and legal proceedings creating or seeking to create, lien for assessments for drainage of said lands; that by act 67 of the extra session of 1877 it was further provided that no assessment or judgment for drainage should operate on any property except that assessed, or should be collected from that property until benefited to value of the assessment.

513 The petition, in addition to these general allegations, specifically alleges that petitioners are owners of four hundred acres situated within the limits excluded from drainage by act 48 of 1877, containing over 16,000,000 of superficial feet, upon which the assessment claimed would amount to more than $50,000 exceeding many fold the value of the property that it has not been drained, and that, so far from draining it the city has made a ditch and thrown up banks of earth by which the natural drainage is destroyed; that to enforce the said assessment as a personal claim against them, would take not only all their swamp property, but a great deal more besides; that the city has recorded a large claim for drainage assessments, as a privilege and mortgage upon the property of petitioners; that the only consideration of the judgment and claim against them for drainage, having entirely failed, it would be against equity and good conscience to enforce said judgment as a privilege against the lands and still more as a personal judgment against them.

The petition contains various allegations charging the unconstitutionality of the laws under which the taxes are claimed and of the taxes and charging sundry other mat-ers not necessary to be here set out, and concludes with a prayer for injunction restraining the city from executing the judgment referred to, or from enforcing any privilege or mortgage against any lands of petitioners on account of any drainage claims in the first drainage district; and for judgment perpetuating said injunction, annulling the judgment complained of, decreeing that the city has no lawful privilege or mortgage on property of petitioners for drainage; ordering the erasure of all inscriptions of such privilege or mortgage or, if such relief be denied restricting the said draining claims and privileges to the property on which they are assessed, and decreeing them not to be a personal debt against them.

To this petition the defendant filed the following exceptions:

1st. To the jurisdiction of the 3rd district court on the ground that the cause fell within the exclusive jurisdiction of the probate or second district court.

2nd. To the jurisdiction of the court on the additional ground that the judgment sought to be annulled being a final judgment of the supreme court of the State affirmed by the Supreme Court of the United States, the said district court had no jurisdiction to annul or set it aside.

3rd. *Res judicata*, alleging that all the matter set forth had been determined by the aforesaid judgment of the supreme court.

4th. No cause of action, as to all matter (if any) not embraced within the plea of *res judicata*, and particularly the portion based on act 48 of 1877, which is alleged to (be) in violation of acts 110 and 118 of the State constitution of 1868, and of section 10, art. 1, of the Constitution of the United States.

The first exception above noted is now deprived of useful object since, under the constitution or the present civil district court, both probate and ordinary jurisdiction are centered therein. We are of opinion, however, that so far as the object of the suit was to declare

the effect of a judgment of the 3rd district court and to regu-
514 late the extent to which it should be held entitled to receive execution, such matters could be inquired of only in that court.

The object of the law in requiring the "payment" of judgments against succession to be "enforced" in the probate court, was simply to force judgment creditors, in common with others, into the concursus of distribution of the succession property, but, in that concursus the probate court would be compelled to give effect to the rights of the judgment creditor as determined by the court which rendered the judgment, and was not vested with power to review its validity or to determine the effect of the judgment, or to decide whether or not it should be executed at all. As to other relief sought in this action, it is clear that this exception could not prevail.

The second exception to the jurisdiction is also confined, in its scope, to the relief asked against the judgment and its execution.

Plaintiffs, in their brief, disclaim and abandon that portion of the prayer of their petition asking that the judgment of the court be annulled and we are therefore dispensed from considering here the question of the power of inferior courts to entertain actions of nullity of judgment of this court.

Plaintiffs confine this relief, with reference to this judgment to a demand to regulate and interpret the judgment and to restrain and limit its execution for cause occurring after its rendition.

Under articles 905 and 915 of the Code of Practice, it seems very clear that the jurisdiction of the court with reference to its own judgment- terminates with their rendition and finality and that all matters touching their execution are remitted to the original cognizance of the inferior courts.

Difference- as to the effect or interpretation of such judgment equally find no form for original assertion except in the same courts.

It is easy to conceive that such differences may honestly arise, and it is plain that cases may arise in which causes, occurring subsequently to the rendition of judgments, may render their execution illegal and inequitable and violative of rights not within the contemplation of the court when the judgment was rendered, and not intended to be foreclosed thereby. Examples are suggested of eviction of the vendee of an immovable after judgment against him for the price; or eviction of a tenant, or destruction of leased premises, after judgment for future rents; and such examples might be easily multiplied.

Here would be failure of the only possible consideration of such judgment-, and it could not be doubted that such failure would furnish just ground to enjoin their execution.

Similar failure of consideration is alleged in this case, and additional relief is asked not connected at all with the judgment.

We have no doubt that the causes of action are within the jurisdiction of the court *a qua*.

The third exception of *res judicata* encounter- three insuperable objections to its maintenance, viz :

1st. The petition distinctly alleges that the heirs of John
515 Davidson (who are parties plaintiff here) "were not parties to said proceeding in the late seventh district court and that John Davidson was dead at the time." There is nothing in the record to contradict this allegation which must be taken as true, and eliminates a necessary element of the plea.

2nd. The record and judgment pleaded as *res judicata* are not put in evidence in support of the plea and do not appear in the transcript, thus leaving us without any proper basis for a determination of the merits of the plea.

3rd. The plea itself is a clear *petitio principæ*. The very questions at issue are, What are the meaning, effect and consideration of the judgment? and whether the causes alleged are sufficient to justify the restraint or limitation of its execution.

It involves an illogical anachronism to say that these questions arising upon, and after the judgment, could have been determined by the judgment. As to other relief sought in the petition, of course the plea has no application.

The fourth exception of no cause of action we shall not discuss at length for the reason that we are desirous of avoiding the slightest trenching upon the merits of this important cause. We are of opinion that the allegations of the petition if established present a case of great hardship and urgently demanding relief which could not be denied unless the stern estop-el of the thing adjudged has indeed operated the miraculous conversion, "*Ex nigro album ex curio rectum.*"

It is certainly a case demanding an investigation and determination upon the entire merits.

In overruling the plea of *res judicata* as here presented, it is perhaps proper to say that we do not mean to debar the court *a qua* from considering it as a defense to the merits, and giving the judgment pleaded such effect, for that purpose, as it may be found entitled to.

It is therefore ordered, adjudged and decreed that the judgment appealed from be annulled, avoided and reversed that the exceptions of defendant be overruled, and the case remanded to be proceeded with according to law, appellee paying costs of this appeal.

A true copy.
(Signed) EMILE DUPRE, *D'y Clerk.*

516 *Document No.* 3.

Offered on behalf of plaintiff.

Filed Jan'y 10th, 1881.

STATE OF LOUISIANA:

Civil District Court for the Parish of Orleans.

JAMES A. WILLARD
vs.
MISSISSIPPI & MEXICAN GULF SHIP CANAL CO. } No. 4845.

Petition.

Filed July 29th, 1873.

Fifth District Court for the Parish of Orleans.

To the honorable fifth district court for the parish of Orleans:

The petition of James A. Willard, a citizen of Ohio, respectfully shows, that he is a judgment creditor for a sum exceeding five hundred dollars, by virtue of judgment of the district court of the United States for Louisiana in the case of E. E. Norton, assignee, Willard subrogated *vs.* J. O. Noyes, *et als.*, No. 9381, of the Mississippi and Mexican Gulf Ship Canal and Drainage Company, a corporation established by notarial act, duly recorded in pursuance of the provisions of the general incorporation law of Louisiana and domiciled in this city of which John Mathers, Jr., is president.

That petitioner caused a writ of *fieri facias* to be issued against said company on said judgment, which writ has been duly returned after demand made of both parties, no property found on execution and said corporation is insolvent.

Wherefore petitioner prays that said corporation be cited to appear and answer this petition and that a forfeiture of its charter be decreed and that a commissioner be appointed to effect the liquidation of its affairs and for costs and for general relief.

(Signed) A. MICOU AND
B. R. FORMAN,
Att'ys for Petitioner.

Answer. Filed Nov. 10th, 1873.

No. 4845. Fifth District Court, Parish of Orleans.

JAMES A. WILLARD
vs.
MISSISSIPPI AND MEXICAN GULF SHIP CANAL COMPANY.

And now comes the defendant and for answer to the petition of plaintiff, denies all and singular the allegations therein contained,

and especially denies that anything has been done by said
517 plaintiff or by this respondent, or by any one, by virtue of which the charter of respondent has become forfeited. They say also, that since the filing of this cause, there has been seized under process issued in the cause named in petition, large and valuable property belonging to respondent exceeding many fold the claim of said plaintiff and the same has been sold by the U. S. marshal and has been purchased by the plaintiff and his counsel; that by such seizure and sale it is apparent that the allegations of plaintiff petitioner are untrue and that he has no cause of action in this suit, even if any ever did exist in his favor.

Wherefore respondent prays that this suit be dismissed and that he have all general relief.

(Signed) RICE AND WHITTAKER, *Of Counsel.*

Judgment.

No. 4845. Fifth District Court, Parish of Orleans.

JAMES A. WILLARD.
vs.
MISS. & MEX. GULF SHIP CANAL & DRAINAGE CO.

This cause came on this day for trial. B. R. Forman, Merrick, Race and Foster, and A. Micou for plaintiff. Lacey & Butler for defendant.

When after hearing pleadings, evidence and counsel; for the reasons orally assigned, the court, considering the law and evidence to be in favor of plaintiff,

It is ordered, adjudged and decreed that there be judgment in favor of plaintiff Jas. Ray, public administrator of the succession of James F. Willard, and against defendant The Mississippi and Mexican Gulf Ship Canal and Drainage Company, decreeing a forfeiture of the charter of said company, and that Tobias Gibson, Esq., be and is hereby appointed commissioner to effect the liquidation of its affairs.

It is further ordered that defendant pay all cost of suit.

Judgment rendered January 12th, 1877.

Judgment signed January 17th, 1877.

(Signed) W. H. RODGERS, *Judge.*

Order Appointing Frederick G. Freret Commissioner.

No. 4845. Fifth District Court, Parish of Orleans.

Filed Jan'y 25th, 1878.

JAMES A. WILLARD—JAS. RAY, Administrator Subrogated,
vs.
MISSISSIPPI & MEXICAN GULF SHIP CANAL COMPANY.

On motion *for* B. R. Forman, att'y for plaintiff, and on showing to the court that Tobias Gibson, Esq., who was appointed by the court

commissioner to liquidate the affairs of the Mississippi and
518 Mexican Gulf Ship Canal Company, otherwise called the Mississippi and Mexican Gulf Ship Canal and Drainage Company, has declined to accept said office and to qualify and assume the duties of said trust, as appears by his written declination hereto annexed. It is ordered by the court that Frederick G. Freret, Esq., be and is hereby appointed commissioner to liquidate the affairs of said Mississippi and Mexican Gulf Ship Canal Company, otherwise called the Mississippi and Mexican Gulf Ship Canal and Drainage Company, and that the amount of his bond be fixed at five thousand dollars, conditioned for the faithful discharge of his duties according to law, and thereupon the said Frederick G. Freret, having filed his bond in the said sum of five thousand dollars, the same is accepted by the court; and he is authorized to enter upon his functions and duties as such commissioner.

Bond of Commissioner. Filed January 25th, 1878.

Know all men by these presents, that Frederick G. Freret, as principal and James D. Hill as surety, are hereby bound unto Hon. Walter H. Rodgers, judge of the fifth district court for the parish of Orleans, Louisiana, and to his successor in office, the sum of five thousand dollars, conditioned that upon the faithful performance by the said Freret of his duties as commissioner to liquidate the affairs of the Mississippi and Mexican Gulf Ship Canal and Draining Company, to which he has this day been appointed and that he will faithfully account for all money or property, that may come into his hands, as such commissioner.

Witness our hands this 25th January, 1878.

(Signed) FREDERICK G. FRERET.
JAMES D. HILL.

James D. Hill being sworn says after the payment of all his debts he is worth the sum of five thousand dollars, and that he resides in the parish of Orleans.

(Signed) JAMES D. HILL.

Certificate.

I, James T. Clark, clerk of the civil district court for the parish of Orleans, hereby certify that the foregoing seven pages contain a true and correct copy of the petition, answer, judgment, order appointing Frederick G. Freret commissioner, and his bond, in the cause wherein James A. Willard is plaintiff and The Mississippi and Mexican Gulf Ship Canal Company is defendant, instituted in the late fifth district court for the parish of Orleans under the number 4845.

In testimony whereof I hereunto set my hand and affix the seal of said court, at the city of New Orleans this 19th day of November, 1880.

(Signed) JAS. T. CLARK, *Clerk.*

519 *Document* 4. *Filed Jan'y* 10*th*, 1881.

STATE OF LOUISIANA:

Fifth District Court for the Parish of Orleans.

Petition. Filed July 30th, 1873.

JAMES A. WILLARD
vs.
WARNER VAN NORDEN ET ALS. } No. 4846.

To the honorable fifth district court for the parish of Orleans:

The petition of James A. Willard, a citizen of Ohio, respectfully shows that since June, 1871, he has been a creditor of the Mississippi and Mexican Gulf Ship Canal and Draining Company, a corporation established under the general corporation laws of Louisiana by notarial act, and domiciled in this parish and city. That said corporation, of which Lafayette Folger or James Mathers, Jr., is president, was originally organized (with) the avowed purpose of digging a ship canal from the Mississippi river to Lake Borgne. That after it had obtained from the State of Louisiana interest-bearing bonds to the amount of six hundred thousand dollars, its directors and managers abandoned the said canal scheme and all work on said canal, and changed its objects or added to its object and purpose that of draining and digging canals, and ditches, and making levees and embankments in, through and around the city of New Orleans; that said corporation obtained from the legislature, by virtue of act No. 30 of 1870, extraordinary rights and privileges, and franchises in relation to draining the city of New Orleans and its suburbs, and the exclusive right to do said work and to receive from the city of New Orleans an enormous price, aggregating about $600,000 per annum. That in order for said company to carry out its objects and to exercise its privileges and franchises aforesaid it was and is necessary for it to have the dredge-boats and other implements and machinery of which it was possessed in May, 1870, and particularly described in an act dated 22nd November, 1872. Petitioner shows that his claims ripened into a judgment about 12th June, 1873, for eighteen hundred and fifty-two $\frac{42}{100}$ dollars, with 8 % interest from 23rd May, 1865, to 22nd July, 1871, with costs.

That when petitioner attempted to execute the said judgment and to seize the property of said company, and its rights and franchises, that he for the first time discovered the hereinafter-named transfers, pledges, and assignments made by the officers of said corporation in fraud of the rights of petitioner and other creditors.

That by act of 22 May, 1872, before A. Hero, notary, a copy of which is annexed to and made a part of this petition, the officers of said company illegally and in violation of their right and duty and in violation of the rights of creditors, transferred to Warner Van

Norden, of this city, all the rights and franchises of the said
520 corporation, and especially those against the city of New Orleans. That said assignment is illegal, that the alleged consideration of $150,000 is in great part fictitious and usurious, and that the rights so conferred are worth $600,000 per annum, and the said transfer is fraudulent and made in fraud of the rights of petitioner and other creditors, and with a view of giving an unfair preference to said Van Norden.

That by act of 22d November, 1872, the said officers of said company, illegally and in violation of law and of the rights of petitioner, and fraudulently and with a view to give an unfair preference to said Van Norden, transferred to him all the property of said company, to wit: Dredge-boat No. 1 and steam derrick, then in the Upper Line canal; dredge-boat No. 2, with steam derrick, then in the Orleans Street draining canal; dredge-boat No. 3, with steam derrick, then in Hagan Avenue canal; dredge-boat No. 4, with steam derrick, then near the lake end of New canal; dredge-boat known as the Ridge boat, which was purchased from the city and then in the Upper Line canal; dredge-boat known as the J. O. Noyes, then in the Carrollton Avenue canal; dredge-boat called the Clam Shell dredge in Upper Line canal, one barge, three flat-boats, two mules, one wagon, five skiffs, two horses, two drays, the steamtug Olive, of the burden of eight tons; blacksmith shops, carpenter shops, all tools and fixtures and machinery belonging to said company.

That said property so illegally transferred was all the property of said corporation, and was all necessary to enable it to carry out the objects of its incorporation and to perform the duties and enjoy the rights, privileges and franchises conferred on it by act No. 30 of 1870. That the said property was worth the full — of two hundred and fifty thousand dollars, but the said transfer on its face is a *dation en paiement* for the sum of $50,000. That the said company was insolvent or in contemplation of insolvency at the time of said transfer, and it was made in fraud of the rights of petitioner, and other creditors, and with a view to give an unfair preference to said Van Norden. That in furtherances of said scheme of fraud the said officers of said company on the 23d November, 1872, made an agreement by which said Van Norden bound himself to do the draining, ditching, &c., required under act No. 30, 1870, and for which the said officers agreed for the company to pay him $15,000 per month and 2½ % on all sums earned or received for said work. That the rights of said company, and its duties, are not transferable. That this last agreement was made with the fraudulent purpose of creating an enormous debt in favor of said Van Norden, in fraud of the rights of creditors and of petitioner, who is one. All of which acts are annexed to and a part of this petition.

Wherefore your petitioner prays the said corporation, through its president, be cited and that Waren Van Norden be cited, and the city of New Orleans, through the mayor, be cited, to appear and answer this petition, and that after due proceedings that each of the above named and described acts, transfers or assignments, be annulled

and set aside, and the property rights and credits, privileges
521 and franchises therein referred to and described be decreed to be the property of the Mississippi and Mexican Gulf Ship Canal and Drainage Company, and subject to the payment of its debts and especially of the judgment in favor of petitioner, and that the city of New Orleans, and the surveyor, W. H. Bell, be cited and condemned and prohibited from delivering or paying to said Waren Van Norden, or any agent of his, certificates, cash warrants, or bills or other property or evidences of debt, or bonds under or in pursuance of any of the aforesaid, or any other agreements or assignments, in reference to the work or drainage done under the act *of* No. 30, 1870, and that Waren Van Norden be condemned to account for and restore all certificates, cash warrants, bills, bonds, and all other property received by him from the city of New Orleans or from said canal and drainage Co., and to pay the full value of all such as he has sold or otherwise disposed of, with interest, and for costs, and for general relief.

(Signed) A. MICAU AND
(Signed) B. R. FORMAN,
Att'ys for Petitioner.

Answer. Filed Jan. 12th, 1874.

No. 4846. Fifth District Court, Parish of Orleans.

JAS. A. WILLARD
vs.
W. VAN NORDEN ET ALS.

And now comes The Mississippi and Mexican Gulf Ship Canal Company, and Waren Van Norden, made defendants in above-entitled cause, and reserving all right to further plead or answer herein, deny all and singular the allegations of plaintiff's petition; and pray to be hence dismissed with costs and for all general relief.

(Signed) RICE & WHITAKER, *Of Counsel.*

Answer. Filed March 28th, 1876.

No. 4846. Fifth District Court.

JAMES A. WILLARD
vs.
WARNER VAN NORDEN.

And now comes the City of New Orleans, and for answer denies all and singular the allegations of plaintiff's petition and files this answer without prejudice to her exceptions.

Wherefore, respondent prays to be hence dismissed with costs and for general relief.

(Signed) SAM. P. BLANC,
Ass't City Att'y.

522 *Judgment. Rendered Jan.* 29, 1878.

No. 4846. Fifth District Court, Parish of Orleans.

JAS. A. WILLARD, JAS. RAY, Admst.,
vs.
WARNER VAN NORDEN and CITY OF NEW ORLEANS.

For the reasons orally assigned by the court and the law and evi dence being considered to be in favor of plaintiff—

It is ordered, adjudged and decreed that there be judgment agains Warner Van Norden and the City of New Orleans, decreeing tha the act of 22d May, 1872, before A. Hero, notary, purporting to trans fer to said Van Norden the rights and franchises of said corporatio and the act of 22d November, 1873, before the same notary, purport ing to transfer to said Van Norden the dredge-boats and other prop erty therein described, and the act or agreement of 23d November 1872, before the same notary, between the said Van Norden and th Mississippi and Mexican Gulf Ship Canal and Draining Company are hereby annulled and set aside, and all the property, rights and credits, privileges and franchises therein referred to and described are decreed to be the property of the Mississippi and Mexican Gul Ship Canal and Drainage Company and subject to the payment o its debts, and that the City of New Orleans, through its mayor and administrators and other officers, are hereby prohibited from deliver ing to said Warner Van Norden, or any of his agents or assigns, any certificates, cash, warrants or bills or other property or evidences o debt or bonds under or in pursuance of the aforesaid or any othe agreements or assignments, in reference to the work or drainag done or to be done under act No. 30 of the legislature of 1870.

It is further ordered that defendants pay all costs of suit.

Judgment rendered Jan. 29th, 1878.

Judgment signed Feb. 21st, 1878.

(Signed) W. H. ROGERS, *Judge.*

A true copy.

Clerk's office, Jan'y 13th, 1879.

(Signed) F. A. LUMINAIS, *D'y Clerk.*

523 *Document* 5. *Filed Jan'y* 10, 1881.

STATE OF LOUISIANA:

Petition. Filed Sept. 8th, 1873.

Fifth District Court for the Parish of Orleans.

ALFRED MARCHAND
vs.
WARNER VAN NORDEN and E. C. PALMER & Co. } No. 4905.

To the Hon. E. North Cullom, judge of the fifth district court for the parish of Orleans:

The petition of Alfred Marchand, who resides in the city of New Orleans, shows with respect:

That on the 15th April, 1872, your petitioner recovered a final judgment against the Mississippi and Mexican Gulf Ship Canal Company in the sum of five thousand one hundred and eighty-seven and $\frac{00}{100}$ dollars, with eight per cent. yearly interest, from the 9th January, 1872, until paid, with clerk's and sheriff's costs in suit No. 9333, of the late seventh district court for this parish, and now suit No. 38172 of the fourth district court for said parish, and your petitioner is now and has been since said date a creditor for said sum against said company, and upon said judgment petitioner has issued execution which has been returned *nulla bona*.

He further avers that it has come to his knowledge that the said company, in order to fraudulently cover its property from its creditors, or to give an unfair preference to one of them, did fraudulently make a transfer thereof to one Warner Van Norden of this city, and more particularly, did on the 22d day of November, 1872, by public act passed before Andrew Hero, Jr., notary, make a fraudulent sale and conveyance of certain dredge-boats, flat-boats, mules, wagons, horses, skiffs, drays, one steamtug with blacksmith and carpenter shops, tools, fixtures, with machinery and appurtenances, the whole more fully described in act, for the pretended indebtedness of $161,962 $\frac{00}{100}$ dollars, to said Van Norden.

Petitioner further avers that at said date, and prior thereto and since, the said Van Norden well knew that said company was heavily in debt, and did accept and advise said sale and transfer of said property with the view and interest of assisting the said company to evade the law and shield said property from the pursuit of its creditors, and to obtain a fraudulent preference as a creditor, for such sum, if any, as was due him, said Van Norden, being impecunious and without capital or credit in any such sum.

And your petitioner further alleges that on the 3d day of May, 1873, with the same intent — object of fraudulently securing a preference and to further said object, said Van Norden did, by public act passed before Andrew Hero, Jr., notary, made a simulated pledge of said before-described property to the firm of E. C. Palmer

& Co., of this city, to which firm the said Van Norden
524 pretended to be indebted for advances made, but who in truth and fact were interested with said Van Norden in said transactions, and were acting in his name therein, said transfers embracing the entire property of said company, all of the facts before stated being well known to said Palmer & Co. and Van Norden, said acts of sale and pledge being hereto annexed as part hereof.

Petitioner avers that said property is liable to execution on the judgment of petitioner, and should be so decreed.

Wherefore your petitioner prays said Warner Van Norden and said E. C. Palmer & Co. be cited herein and after due proceedings that the said sales and transfers be set aside and said property be decreed to be the property of the "Mississippi and Mexican Gulf Ship Canal Company," and subject to the payment of its debts, and especially of the judgment of petitioner, with all interest and costs, over the other creditors, and your petitioner prays for all general and equitable relief.

(Signed) HORNOR & BENEDICT, *Att'ys.*

Answer. Filed November 4, 1873.

No. 4905. Fifth District Court for the Parish of Orleans.

ALFRED MARCHAND
vs.
WARNER VAN NORDEN and E. C. PALMER & Co.

And now comes Warner Van Norden and E. C. Palmer & Co., and for answer to the petition filed herein, by plaintiff, deny all and singular the allegations therein contained.

Wherefore, reserving all rights to further answer or otherwise plead herein, respondents pray that plaintiff's suit be dismissed with costs and for all general relief.

(Signed) RICE & WHITTAKER, *Of Counsel.*

Judgment. Rendered June 28, 1877.

No. 4905. Fifth District Court for the Parish of Orleans.

ALFRED MARCHAND
vs.
WARNER VAN NORDEN ET ALS.

In this case, for the reasons assigned in the written opinion of the court this day delivered and on file—

It is ordered, adjudged and decreed that the sales and transfers to Warner Van Norden as set forth in plaintiff's petition be set aside, that the property described in the act passed before Andrew Hero, Jr., on the 22nd November, 1872, be decreed to be the property of the Mississippi and Mexican Gulf Ship Canal Company and subject to the payment of its debts, and especially of the judgment of plaintiff, with all interests and costs in suit No. 9333 of the late

seventh district court for the parish of Orleans, and now suit
525 No. 38172 of the fourth district court for said parish (viz: the sum of five thousand one hundred and eighty-seven $\frac{60}{100}$ dollars, with eight per cent. interest per annum thereon from January 9th, 1872, until paid, with clerk's and sheriff's costs) over the other claims of all other creditors.

It is further adjudged and decreed that whatever rights E. C. Palmer & Co. may have in this matter they can assert at the proper time, and the rights of plaintiff are reserved to contest in such proceedings as the law may permit the claims of said E. C. Palmer & Co. upon the property which is alleged to have been pledged to them.

It is further ordered that defendant W. Van Norden pay all costs of suit.

Judgment rendered June 28th, 1877.

Judgment signed July 3rd, 1877.

(Signed) W. H. ROGERS, *Judge.*

A true copy:

Clerk's office, Jan'y 13th, 1879.

(Signed) E. A. LUMINAIS, *D'y Cl'k.*

Document 6. *Offered on Behalf of Plaintiff.*

Filed Jan'y 10, 1881.

Transfer of Miss. & Mex. Gulf Ship Canal Co. and W. Van Norden, transferee and individually, to the city of New Orleans.

UNITED STATES OF AMERICA,
State of Louisiana.

PARISH OF ORLEANS, CITY OF NEW ORLEANS.

Be it known that on this seventh day of the month of June, in the year of our Lord one thousand eight hundred and seventy-six, and of the Independence of the United States of America, the one hundredth—

Before me, Gustave Le Gardeur, Jr., a notary public duly commissioned and sworn, in and for the parish and city aforesaid, therein residing, and in the presence of the witnesses hereinafter named and undersigned,

Personally came and appeared:

1st. The Honorable Charlas J. Leeds, mayor of the city of New Orleans, and herein duly authorized as such, under and by virtue of ordinances Nos. 3479 and 3539 administration series, adopted by the council of the city of New Orleans, respectively on the 25th day of April and 23rd day of May, 1878, and herein furthermore fully authorized under and by virtue of the provisions of acts No. 16 of acts of 1876, approved February 24th, 1878.

2nd. Messrs. John Mathers, Jr., and Samuel D. Moody, both of this city and herein acting, the former as president, and the latter as secretary of the Mississippi and Mexican Gulf Ship Canal Company,

526 a duly organized corporate body of this State domiciled in this city, and herein acting in their said capacities, under and by virtue of a resolution of the board of directors of the said Mississippi and Mexican Gulf Ship Canal Company adopted at their sitting of the third day of June, 1876, a duly certified copy of which said resolution is hereto annexed for reference.

3rd. And Warner Van Norden, Esq., also of this city, herein acting in his own name individually and also as transferee and pledgee of the said Mississippi and Mexican Gulf Ship Canal Company, under and by virtue of an (act) passed before Andrew Hero, Jr., a notary public in this city, on the twenty-second day of May, 1872.

And the said Mississippi and Mexican Gulf Ship Canal Company, through its president and secretary aforesaid, and the said W. Van Norden, as transferee and pledgee of the said company, by virtue of the aforesaid act of the twenty-second day of May, 1872, before the said A. Hero, Jr., notary, declared that for the consideration and on the terms and conditions hereinafter set forth, they do, by these presents, grant, bargain, sell, convey, transfer, assign and set over with a full guarantee against all troubles, debts, mortgages, claims, evictions, donations, alienations or other encumbrances whatsoever, unto the said city of New Orleans, the said Chas. J. Leeds, as mayor aforesaid, accepting and purchasing for and in the name of the said city of New Orleans, under and by virtue of the authority in him vested by said ordinances Nos. 3479 and 3539, administration series, duly certified copies whereof are hereto annexed for reference, also under and by virtue of the rights and powers conferred by said act No. 16 of the acts of 1876, and acknowledging due delivery and possession thereof:

All and singular the rights, title, interest, share claim, demand, franchises, privileges, contracts and advantages of every nature and kind whatsoever which the said Mississippi and Mexican Gulf Ship Canal Company has or may have under and by virtue of act 30 of the legislature of this State, entitled "An act to provide for the drainage of New Orleans," passed at the session of 1871, and of all other acts of the legislature of this State, and which the said W. Van Norden, as transferee and pledgee aforesaid, has or may have under and by virtue of the aforecited act passed on the twenty-second day of May, 1872, before the said Andrew Hero, Jr., notary.

And the said W. Van Norden, in his own name individually, declared that for the consideration and on the terms and conditions hereinafter set forth, he does, by these presents, grant, bargain, sell, convey, transfer, assign and set over with a full guarantee against all troubles, debts, mortgages, claims, evictions, donations, alienations or other encumbrances whatsoever unto the said city of New Orleans, the said Chas. J. Leeds, as mayor aforesaid, accepting and purchasing for and in the name of the said city of New Orleans, under and by virtue of the authority in him vested by said ordinances Nos. 3479 and 3539, administration series, and also under and by virtue of the rights and powers conferred by said act No.

16 of the acts of 1876, and acknowledging due delivery and possession thereof:

527 All and singular the following-described dredge-boats and derricks, together with the machinery, engine, tackle, apparel and appurtenances, and all other necessaries thereto belonging, together with the hereinafter-mentioned articles and effect-, to wit:

Dredge-boat No. 1, seventy feet long and thirty feet wide.

Dredge-boat No. 2, seventy feet long and thirty feet wide.

Dredge-boat No. 3, seventy feet long and thirty feet wide.

Dredge-boat No. 4, seventy feet long and thirty feet wide.

Dredge-boat styled the J. O. Noyes, sixty-two feet long and nineteen feet wide.

Dredge-boat styled Clam Shell dredge, sixty-five feet long and thirty feet wide.

Dredge-boat known as the Ridge boat, eighty-three feet long and thirty feet wide.

Four derricks accompanying respectively dredge-boats Nos. 1, 2, 3 and 4.

One steamtug known as the Olive.

One barge for floating derricks.

One floating boarding-house.

One lot of buildings at Halfway house.

One lot of large and small castings, including one heavy cast-iron mainmast, two heavy cast-iron topmasts, hoisting and surging drums, duplicate cog wheels and various small castings, &c., the whole more fully set forth in a detailed inventory on file in the office of the city surveyor.

The said Warner Van Norden, in his own name individually, is the owner of the above-described dredge-boats, derricks and other effects and articles for having acquired the same by purchase from the said Mississippi and Mexican Gulf Ship Canal Company by act passed before the said A. Hero, Jr., notary, on the twenty-second day of November, 1872.

To have and to hold the said rights, title, interest, share, claim, demand, franchise, privileges, contracts and advantages of the said Mississippi and Mexican Gulf Ship Canal Company and of the said W. Van Norden, as transferee and pledgee aforesaid, and the said dredge-boats, derricks, and other articles and effects above described, unto the said city of New Orleans by virtue of these presents.

And the said Mississippi and Mexican Gulf Ship Canal Company through its president and secretary aforesaid, and the said W. Van Norden, as transferee and pledgee aforesaid, and in his own name individually, declared that they do moreover, by these presents, subrogate the said city of New Orleans in and to all and singular the rights, actions and remedies to which they are or may be entitled under and by virtue of the aforesaid act No. 30 of 1871, or of all other acts of the legislature of this State, and under and by virtue of the aforecited acts passed before the said Andrew Hero, Jr., notary, respectively on the twenty-second day of November, 1872; thereby authorizing the said city of New Orleans to exercise and enjoy the said rights, actions and remedies in the same manner

and to the same extent as it, the said Mississippi and Mexican Gulf Ship Canal Company and the said W. Van Norden, as transferee and pledgee and in his own name, individually might or could have done.

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The sale of the said rights, title, interest, share claim, demand, franchises, privileges, contracts, and advantages by the said Mississippi & Mexican Gulf Ship Canal Company and the said W. Van Norden, as transferee and pledgee aforesaid, and the sale of the said dredge-boats, derricks, and other articles and effects by the said W. Van Norden, in his own name individually, are made and accepted for and in consideration of the price and sum of three hundred thousand dollars ($300,000) payable in drainage warrants.

And now the said J. Mathers, Jr., and S. D. Moody, in their respective capacity, and the said W. Van Norden as transferee and pledgee aforesaid, and in his own name individually, declared that they have covenanted and agreed and do by these presents, covenant and agree that the said sum of three hundred thousand dollars in drainage warrants shall be paid in full to the said W. Van Norden in consideration of the sales herein made and also in full settlement of all existing claims for damages which the said Mississippi and Mexican Gulf Ship Canal Company and the said W. Van Norden, as transferee and pledgee aforesaid, and in his own name individually ever had or have now or may have against the said city of New Orleans. And the said Mississippi and Mexican Gulf Ship Canal Company, through its president and secretary aforesaid, does moreover by these presents, fully authorize the said city of New Orleans to pay the said sum of three hundred thousand dollars in drainage warrants to the said Warner Van Norden.

And now to these presents personally came and appeared:

The Honorable John G. Brown, administrator of accounts of the city of New Orleans, who, by virtue of authority in him vested by said ordinance No. 3539, administration series, and of the rights and powers conferred by said act No. 16 of acts of 1876, and with the consent of the said Mississippi and Mexican Gulf Ship Canal Company, as is hereby declared and acknowledged by the said J. Mathers, Jr., and S. D. Moody, in their respective capacity, and for and in the name of the said company, has presently and in the presence of the notary and witnesses undersigned, handed over and delivered the said sum of three hundred thousand dollars ($300,000) in drainage warrants to the said Warner Van Norden, who, as transferee and pledgee aforesaid, and in his own name individually, and with the full and entire consent of the said Mississippi and Mexican Gulf Ship Canal Company, as is hereby declared and acknowledged by the said J. Mathers, Jr., and S. D. Moody, in their respective capacity, and for (and) in the name of the said company, hereby acknowledge receipt of the same.

And now for the purpose of providing for the payment of the warrants issued under and by virtue of these presents and of all other drainage warrants heretofore issued and outstanding, the said City of New Orleans, through its mayor aforesaid, the said Missis-

sippi and Mexican Gulf Ship Canal Company, through its
529 president and secretary aforesaid, and the said Warner Van Norden, as transferee and pledgee aforesaid, and in his own name individually do, by these presents, covenant and agree that the existing rights and powers of the holders of drainage warrants under the several acts of the legislature of this State, relative to drainage and drainage assessments, shall remain unimpaired and that the drainage tax and assessments shall be administered, collected and paid under the terms and conditions, following, to wit:

The bureau of drainage collections shall be organized in an office at the city hall, as follows, to wit:

A book-keeper, who shall be appointed by the city council, and who shall keep such books and records, make such reports and perform such duties as may be required by the administrator of finance and accounts. His salary shall not exceed two hundred dollars ($200) per month.

Said officer shall not in any manner obstruct or delay the business of the office; he shall be removable by the council upon the complaint of the collector hereinafter provided for, for cause.

If desired by the said W. Van Norden, a duplicate set of books shall be made and placed subject to the use of the said collector.

Until the drainage warrants issued by virtue of these presents in conformity with said ordinance No. 3539, administration series, and all other drainage warrants heretofore issued and now outstanding, shall be liquidated and paid, the collection of drainage assessments shall be assigned to an officer who shall be selected by the said W. Van Norden and be confirmed by the city council. Said officer shall give bond with good and solvent security in the sum of twenty-five thousand dollars ($25,000) for the prompt and faithful execution of the duties and powers provided by law for the collection of drainage assessments and the prompt and efficient collection of the same in accordance with law; and the business of his office shall be subject to the supervision of the administrators of finance and accounts. He shall receive a compensation in lieu of expenses of all kinds, including books, bills, stationery, legal services, costs of court or clerks' hire, of three hundred dollars ($300) per month and two and a half per cent. commission on collection of drainage assessments, and shall make such monthly reports as may be required by the administrators of finance and accounts. Said collector shall be continued in office until the liquidation of the said drainage warrants issued by virtue of these presents or heretofore issued and now outstanding; and in case of death or resignation, a successor shall be chosen, as above provided for.

No receipt of the said collector for drainage assessments shall be valid unless countersigned by the administrator of finance.

The city council shall have the right to remove the said collector for good and sufficient cause, and a successor shall be appointed, as hereinabove provided.

All expenses, fees and charges incurred in the collection of drainage assessments shall be paid out of the drainage fund. All suits and judicial process and writs relating to or appertaining to the

drainage assessments and taxes shall be and continue as here-
530 tofore controlled by the city council and be conducted by the city attorney; but all writs of "*fieri facias*" to be issued or required by law and the judgments of the courts. All parties owing drainage assessments shall have the right to pay the same in drainage warrants at their face value and interest thereon, and the said collector and administrator of finance shall receive the same in satisfaction of all drainage assessments.

All parties owing drainage assessments in the fourth drainage district shall be entitled upon the prompt payment of the four-tenths of the whole assessment, to an extension of time for the payment of the remaining six instalments, the said six instalments shall be paid yearly as prescribed by an ordinance already adopted by the city council.

And now the said mayor Chas. J. Leeds hereby promises for and binds and obligates the city of New Orleans, after date of these presents, to issue no drainage warrants other than those issued by virtue of these presents in conformity with the said ordinance No. 3539, administration series, and such other drainage warrants as may be issued and outstanding until said warrants have been fully liquidated and paid, and not to obstruct or impede, but, on the contrary, to facilitate by all lawful means the collection of the drainage assessments as provided by law, until said warrants have been fully paid, it being well understood and agreed by and between the said parties hereto, that collections of drainage assessments shall not be diverted from the liquidation of said warrants and payment of expense as hereinabove provided for under any pretext whatsoever, until the full and final payment of the same. And it is moreover well understood and agreed by and between the said parties hereto that all work heretofore made by said W. Van Norden not certified shall be measured by the city surveyor and the same shall be paid for in drainage warrants in the usual form, and that inasmuch as it has been claimed that certain collections of drainage funds have been applied by the previous administrations to general fund purposes, the said city of New Orleans will issue to the said Warner Van Norden the sum of twenty thousand dollars ($20,000) in drainage warrants in full satisfaction of the same.

And now, by virtue of the foregoing, the said Mississippi and Mexican Gulf Ship Canal Company, through its president and secretary aforesaid, and the said Warner Van Norden, as transferee and pledgee aforesaid, and in his own name individually, declared that they do, by these presents, remise, release and forever discharge the said city of New Orleans from and against any and all claims and demands of every nature and kind whatsoever which they ever had or have now or may have against the said city of New Orleans.

And now it is moreover well understood, covenanted and agreed that the said Mississippi and Mexican Gulf Ship Canal Company and the said Warner Van Norden, individually and as transferee and pledgee aforesaid, shall and will at all times protect the said city

of New Orleans against and save it harmless from any and
531 all claims and demands of every nature and kind whatsoever which may have been, can now be or may hereafter be set up against the said city of New Orleans or against them or either of them in reference to drainage work or arising out of their connection with the drainage of the city or in any manner pertaining or relating to their acts, rights, franchises and privileges under said act No. 30 of 1871, or in reference to the said dredge-boats, derricks and other articles and effects; provided, however, that the guarantee herein set forth shall not be considered as extending any further than to warrant the city of New Orleans in the title of the boats and property herein transferred to it by said W. Van Norden, and to save and indemnify it, the said city of New Orleans, from any loss, injury or damage arising from the acts and conduct of the said Mississippi and Mexican Gulf Ship Canal Company or the said Warner Van Norden in reference to or arising from their connection with the drainage works herein referred to.

Thus done and passed in New Orleans, at my office, the day, month and year first above written, in the presence of Armand Pitot, Jr., and Gustave M. Letellier, competent witnesses, who have signed these presents with the said party and me, notary, after reading the whole.

(Original signed) CHAS. J. LEEDS, *Mayor.*
J. MATHERS, JR., *President.*
S. D. MOODY, *Secretary.*
J. G. BROWN, *Adm'r Pub. Acc's.*
W. VAN NORDEN.
A. PITOT, JR.
G. M. LETELLIER.
G. LE GARDEUR, JR., *Not. Pub.*

Registered in Conveyance Bk. 108, fo. 484.
New Orleans, June 7th, 1876.
(Signed) C. B. FISH, *Register.*

A true copy of the original on file and of record in my office, New Orleans, December 23rd, 1880.
(Signed) G. LE GARDEUR, JR., *Not. Pub.*

Opinion of the Court.

Filed Feb'y 28, '81.

Civil District Court.

HENRIETTA DAVIDSON ET ALS.
vs.
CITY OF NEW ORLEANS, JOHN CROSSLEY & SONS, LIMITED, Interveners. } No. 1306.

I find the following facts established in this case:

1. That plaintiffs are the owners of the real property in the first drainage district described in the statement marked "A," of which

the dimensions are given in the first column, the number of
532 square in the second, boundaries in the third, the assessed value of each piece in the fourth, the amount of the drainage tax in the fifth and the purchase price in the sixth.

2. That each drainage district is susceptible of reclamation independently of the other districts prescribed by the act 165 of 1858, and that in point of fact the work done in other districts has not benefited lands lying in the first.

The soil of the first district from the river as far as Claiborne street having been reclaimed at their own cost by the authors of the present proprietors, and that between Claiborne and Metairie ridge having been drained by the Old Draining Company organized in 1835 by means of contributions supplied by the land-holders of that area.

3. The rate of drainage taxation in the first drainage district consists of $3\frac{3}{10}$ mills per superficial foot and 2 mills per superficial foot in the others.

4. There are no bonds or debts outstanding under the amendatory act of 1859.

5. That in the proceedings instituted in the late 7th dist. court, entitled, "In the matter of the Commissioners of the First Drainage District praying for the homologation of the assessment-roll, etc.," which resulted in the judgment of the Supreme Court, reported in the 27th Annual, p. 20.

(*a.*) Henrietta Davidson, executrix, alone was a party, and none other of the present plaintiffs.

(*b.*) That the sole consideration and predicate of said decree was the prospective benefit to accrue to the landed proprietors by the proposed execution of the projected work and the resulting enhancement of value of the lands to the extent at least of the amount levied upon it; any other interpretation of said decree leading to a flagrant violation of the equitable principle and the constitutional guarantee that private property shall not be taken for public use without adequate compensation to its owner.

(*c.*) That whatever work has been done by the commissioners or the city has been a detriment rather than a benefit to plaintiff's lands, notably by the artificial obstruction of a bayou, thus impeding the natural drainage.

(*d.*) That since the rendition of the judgment in question (27th Ann., p. 20), the plan established under the act of 1858 has been changed in important particulars and the whole scheme of prospective reclamation which was the *ratio existendi* of that judgment has been abandoned as futile and fallacious by the city with the sanction of the legislature. The dredge-boats and other implements for drainage purposes having been sold in 1876, since which time not a blow has been struck in the way of work in any of the districts as contemplated by the acts of 1858 and 1871, and by the decree of the Supreme Court invoked by defendants and interveners. That not one inch of plaintiff's land has been benefited to the extent of one farthing by the work which should have been executed and

which has not been extended in consideration of the exhorbitant and spoliatory contribution sought to be enforced from them.

533 (e) That the charter of the notorious Mississippi and Mexican Gulf Ship Canal Company has been judicially forfeited for insolvency and its assigns have entirely given up the work or pretended work of drainage and the city of New Orleans has not even attempted to prosecute the same for the last five years.

6. That all the labor expended in the first drainage district has been paid for in money or in premium bonds to the amount of three hundred and seventy-four thousand two hundred and ninety-five $\frac{25}{100}$ dollars since the month of June, 1871. That drainage warrants to the amount of one million five hundred and forty thousand three hundred and twenty $\frac{75}{100}$ dollars have been merged and funded in gold bonds and these into premium bonds secured for their payment by an annual tax levy of five mills on all the property within the city of New Orleans, of which plaintiffs support their share, by reason of which, if plaintiffs were cast in this suit they would be subjected to a duplicate tax for one purpose.

7. That there are no drainage warrants outstanding for work alleged to have been executed in the first district unless for the comparatively insignificant sum of four hundred and fifty dollars, which represent to that extent the cost of permanently submerging the plaintiffs' land without affording an adequate measure of the damages they have suffered.

8. The 7th court's homologation was of the tableau for the 1st district, the proceeds applicable to the drainage of the same, whereas intervener's claim is based on work done in other districts, thus including the plea of *res judicata*.

In the recently decided case of the succession of Patrick Irwin the supreme court has declared the nullity and unconstitutionality of act No. 30 of 1871, a conclusion obviously irresistible in view of article 114 of the constitution of 1868. Considering that the claims held by the city or by the interveners arise under the act of 1871, so stricken with legal paralysis, it becomes unnecessary that I should pass upon the Federal question of the divestiture of vested rights, or the question of impairment of the obligation of a contract.

All the premises considered, I hold it to be against equity and good conscience no less than a violation of law to tolerate the enclosed collection from plaintiffs of the exorbitant sums claimed, whether in the form of a privilege upon their estate or in the form of a personal judgment.

The court will not remunerate a wrong-doer.

Let the plea of *res adjudicata* be overruled.

Let the demand in intervention be rejected with costs.

Let there be judgment in favor of plaintiffs and against defendants, as prayed for, and costs of suit.

(Signed) N. H. RIGHTOR, *Judge.*

534 *Judgment.*

Rendered February 28, 1881.

Civil Dist. Court.

HENRIETTA DAVIDSON ET ALS.
vs.
CITY OF NEW ORLEANS. } No. 1306.

In this case submitted to the court on the 8th day of February, 1881, for the reasons assigned in the written opinion of the court, this day delivered and filed, it is ordered, adjudged and decreed that the plea of *res judicata*, herein filed, be overruled and there be judgment in favor of said plaintiffs Henrietta Davidson individually and as executrix of J. Alexander Davidson, and Elizabeth J. Davidson, wife of Charles H. Bailey, Mary S. Davidson, wife of David Este Reynolds, John Davidson and Charles M. Parks, and against the city of New Orleans, perpetuating the injunction herein issued, and that the said city of New Orleans, its agents and attorneys, be perpetually enjoined from exacting or attempting to exact or carry into effect the judgment of the supreme court of Louisiana rendered "In the matter of the Commissioners of the First Drainage District," late of the seventh district court, for the parish of Orleans, and now of the civil district court for the parish of Orleans, and the said defendant, its agents and attorneys, are enjoined from enforcing any mortgage or privilege against any lands of plaintiffs on account of any claims for drainage tax in the first district, bounded by Mississippi river, Julia street, New canal, Lake Pontchartrain, Bayou St. John and Old canal and St. Peter street, and that all inscriptions for drainage privilege or mortgage be cancelled and erased by the recorder of mortgages at the costs of defendants, The City of New Orleans, and that said defendant pay the costs of suit.

It is further ordered, adjudged and decreed that the demand of John Crossley and Sons, Limited, interveners herein, be rejected with costs.

Judgment rendered February 28th, 1881.

Judgment signed March 7th, 1881.

(Signed) N. H. RIGHTOR, *Judge.*

Motion of the City of New Orleans for a Suspensive Appeal.

Filed March 8th, 1881.

Division "D," Civil District Court.

HENRIETTA DAVIDSON, Executrix, ET ALS.
vs.
CITY OF NEW ORLEANS—JOHN CROSSLEY & SONS (LIMITED), Interveners. } No. 1306.

On motion of Sam. P. Blanc, attorney for the city of New Orleans,

and of George S. Lacey, of counsel for the defendant herein,
535 and upon suggesting there is error in the judgment herein, rendered on the 28th day of February, 1881, and signed on the 7th day of March, 1881, and that appearer desires to obtain a suspensive appeal from said judgment.

It is ordered that a suspensive appeal be allowed herein, returnable to the supreme court of the State of Louisiana on the 1st Monday in April, 1881, upon defendants giving bond, for costs, in the sum now fixed by the court, to wit: the sum of five hundred dollars, there not being sufficient time to complete the transcript by the 3rd Monday in March, 1881.

Appeal Bond.

April (filed) March 12th, 1881.

Know all men by these presents, that we, The City of New Orleans, as principal and George S. Lacey and Alexis Bonnecaze, as sureties, are held and firmly bound *in solido* unto James T. Clark, clerk of the civil district court for the parish of Orleans, his successors, executors, administrators and assigns, in the sum of five hundred dollars for the payment whereof we bind ourselves, our heirs, executors, administrators, firmly by these presents.

Sealed with our seals and dated in the city of New Orleans on this eleventh day of March in the year of our Lord one thousand eight hundred and ninety-one.

Whereas, the above-bounden The City of New Orleans has filed a motion for a suspensive appeal from a final judgment rendered against it in the suit of Henrietta Davidson, executrix, *et al.*, *vs.* The City of New Orleans.

No. 1306 in the civil district court for the parish of Orleans on the 26th day of February, 1881, and signed on the 7th day of March, 1881.

Now, the condition of the above obligation is such that the above-bound The City of New Orleans shall prosecute its appeal, and shall satisfy whatever judgment may be rendered against it or that the same shall be satisfied by the proceeds of the sale of its estate real or personal, if it be cast in the appeal; otherwise, that the said George S. Lacey and Alexis Bonnecaze sureties shall be liable in its place.

(Signed)	JOS. A. SHAKSPEAR.	[SEAL.]
(Signed)	GEO. S. LACEY.	[SEAL.]
(Signed)	A. BONNECAZE.	[SEAL.]

UNITED STATES OF AMERICA,
State of Louisiana.

Supreme Court of the State of Louisiana.

NEW ORLEANS, MONDAY, *January 16th*, 1882.

The court was duly opened pursuant to adjournment.

Present: Their honors Edward Bermudez, chief justice; Felix P.

Poche, Robert B. Tood, William M. Levy, Charles E. Fenner, associate justices.

536 His honor the chief justice pronounced the opinion and judgment of the court in the following case:

HENRIETTA DAVIDSON
vs.
CITY OF NEW ORLEANS. } No. 8260.

Appeal from the civil district court for the parish of Orleans.

The object of this suit is to render inoperative a judgment for a drainage tax and eventually to regulate its effect.

The conspicuous features of the case presented by the record are the following:

In January, 1875, a judgment was rendered on appeal, by the supreme court of this State, then in existence, reversing that of the lower court and approving and homologating the assessment-roll presented in 1871 by the commissioners of the first drainage district, the approval and homologation to operate as a judgment against the property described as assessed in said roll, and also against the owner, or owners thereof, with ten per cent. in addition to the amounts assessed, to pay costs and counsel fees, 27 A., 21. This judgment was affirmed by the Supreme Court of the United States, who did so, saying that there was no error in the judgment of the supreme court of Louisiana of which it has cognizance. 96 U. S., 96.

A piece of rural property known as the "Allard place" was mentioned on said roll, as belonging to John Davidson. A tax of $40,253.85 was assessed upon it, as due for the drainage of the same.

Upon the complaint that the city of New Orleans which had by law succeeded the commissioners, was about to take steps for the satisfaction of that claim, out of said property and of other property of theirs, and that said judgment had ceased to have any vitality for reasons stated, and could not longer be enforced, the widow and executrix and the heirs of John Davidson obtained an injunction arresting the writ, and prayed that it be perpetuated; that it be decreed that the city of New Orleans has no legal claim on any of their lands for drainage; that all inscriptions therefor be cancelled and, if this relief be denied, that said claims be restricted to the specific property upon which it was assessed and not to be a personal debt against any of them.

The city filed exceptions to the jurisdiction of the court and pleaded *res judicata* and no cause of action.

On appeal from a judgment dismissing the suit, this court disposed of the exception *of* the jurisdiction and no cause of action and reserving the right of defendant to reiterate the other plea and to set up other defenses, remanded the case. 32 Ann. L., 1245.

Upon the remanding, the city renewed the plea of *res judicata* and asserted the impairing of the obligations of a contract, alleged to have been formed, touching the levy, collection and application of the drainage tax claimed.

537 John Crossley & Co., representing themselves as owners of drainage warrants for $688,695, whereof $368,695 issued under act 30 of 1871 and $320,000 under act 16 of 1876 of the General Assembly of this State, intervened in the suit. They claim that the warrants were issued with due authority, for legal consideration, and are secured for payment under the statutes which constitute a contract, the obligations of which could not be and were not legally impaired by any act of the State.

They claim no judgment either against the plaintiffs or against the city.

From a judgment in favor of plaintiffs the defendants and the interveners have appealed.

The grounds upon which the plaintiffs seek relief appear to be six in number.

1st. That all of petitioners' land in the first drainage district, between the Mississippi river and the Metairie ridge having been drained and the expense of the drainage having been paid under the drainage statutes of 1835–1839, the subsequent assessment, under the act of 1858, merged into the judgment enjoined and is not legally exigible.

2d. That by act 165 of 1858 the assessment for draining any one section or district could not exceed $350,000 and payments of drainage tax having been made in excess of that amount there is nothing due and exigible under the judgment aforesaid.

3d. That the tax levied and imposed in the first drainage section for drainage purposes is greater in amount than the benefit to be derived by the owner of the assessed property, from the drainage work; taxation accompanied by such result is tantamount to confiscation and by reason thereof the tax is violative of the fundamental law and so void.

4th. That the drainage acts passed in 1858 and 1859, 1861 and act 30 of 1871 levy and impose a drainage assessment not equal and not uniform, and therefore are violative of the constitution of Louisiana in force at the time when those laws were enacted.

5th. That the drainage work for which the tax underlying the judgment in controversy was rendered has not been done and that the scheme has been abandoned; that such abandonment works a cancellation both of the drainage tax and of the judgment for the same herein enjoined.

6th. That the drainage assessment against the property of their author, John Davidson, and the judgment obtained therefor, have been released by acts 48 and 67 of 1877 and act 147 of 1878 of the General Assembly of the State.

In defense, the city pleads that all those grounds, with the exception of those which relate to the non-performance and abandonment and to the release mentioned, were advanced in the opposition filed by the succession of John Davidson, represented by his executrix, to the proceedings for an homologation of the drainage-tax assessment-roll or tableaux; that they were directly passed upon by the Supreme Courts both of Louisiana and of the United States, and that such judgment constitutes *res judicata;* that even if those

538 grounds had not been specifically and fully set forth, they should have been thus alleged, as they then existed and could have been set forth and they cannot be propounded after judgment.

The city of New Orleans further pleads and argues, as concerns the additional defense of abandonment and release, that the work was done as far as practicable, that there has been no abandonment on the part of the city but merely a temporary suspension of operations wholly occasioned by the fault of the property-owners, in not paying their drainage tax; that an actual abandonment by the city could not have a legal effect of relieving the tax-payers of the drainage assessment and tax; that at the time of the pretended abandonment the Mississippi and Mexican Gulf Ship Canal Company and its transferrees and the holders of warrants issued by the company had acquired a vested right to the entire tax levied in the four drainage sections; that such pretended abandonment, if supplemented by a release of the property-owners, from a payment of that tax will impair the obligation of a contract and divest the valuable rights thus vested in the company and the parties referred to, and consequently that the alleged abandonment and the pretended cancellation of the drainage assessment must be treated as in violation of the fundamental law, and so, absolutely void.

From the view which we have taken of the merits of the controversy, from an independent standpoint, we do not think it necessary to pass upon the defense of *res judicata*. If it were sustained, the first four grounds relied upon by the plaintiff could not be considered. If it were overruled, we would not adjudicate upon their sufficiency for relief, as there exists another ground upon which we can satisfactorily rest a decision of the case before us.

The same view dispenses us from determining whether the judgment enjoined can or not be construed and regulated in its effect, so as to be restricted in its enforcement to the property on which the drainage tax was assessed and from which it is claimed that it should primarily be paid; in other words, whether the judgment be both real and personal, or real only.

For the same reason we are relieved from the obligation of considering and determining the effect of section 12 of act 165 of 1858, as well as that of acts 48 and 67 of 1877, and of act 147 of 1878, invoked by the plaintiffs, for their further protection.

Conceding, for argument's sake, that the first four grounds of the petition and all other causes of complaint, which existed could have been set up at the date of the opposition to the drainage assessment-roll, have been adjudicated upon and that the judgment rendered constitutes an insuperable objection to their being again agitated, it does not at all follow, that the judgment is one which necessarily must be executed, or one which cannot be nullified, that is, declared inoperative, and of no effect; in other words, paralyzed as though it were a nullity.

It is worthy of note, that, in the opinion rendered in 27th A., 21, the court expressly refers to the memorable decision in 11th A., 370, which both parties from different standpoints invoke as a shield in

this litigation for their respective protection. That opinion
539 contains a most material reserve which leaves a wide door open for resistance to the judgment in question.

This suit is to have that judgment declared inoperative, because of what has occurred since it was pronounced and which could not have been pleaded before it was rendered.

As was said in our previous opinion: "It is easy to conceive that * * * cases may arise in which causes concurring subsequently to the rendition of judgments may render their execution illegal and inequitable and violative of rights not within the contemplation of the court when the judgment was rendered and not intended to be foreclosed thereby. Examples are suggested of eviction of the vendee after judgment for the price, or eviction of a tenant, or destruction of leased premises, after judgment for future rents, and such examples might be easily multiplied. Here would be failure of the only possible consideration of such judgments and it could not be doubted that such failure would furnish just ground to enjoin their execution." See 13 A., 249; 3 An., 646; Story's Eq., par. 887, 889.

In its wisdom the Spanish law, once in force in this State, but the spirit of which has survived intervening changes, and still abides with us, expressly provides, for such contingencies on the subject of *res judicata*. It declares that if the parties have appealed from the judgment and it is confirmed by the sentence of a competent superior tribunal, they shall be bound forever by it, thereafter; "Yes, if anything should afterwards happen to destroy its force, it will cease to have effect against the parties or their heirs." Partidas 3d Tit. 22, law 19.

This principle is necessarily inherent to all legislation particularly when the consideration of the judgment is prospective and must have enured as a condition precedent to its execution or enforcement.

In the case in which the judgment invoked as constituting *res judicata* was rendered, the court formally declared that the constitutional questions raised had been decided in 11 A., 370.

Referring to the opinion in that celebrated controversy, we find that the court there used the following language:

"We have not understood from counsel that there are cases in which the property has not been so far benefited by the work done, as to be increased in value more than the cost of the work assessed. Were not this the case, the property of each proprietor to the extent of the difference between the increased value and the cost of the work assessed to him, would be taken for a purpose of public utility, without adequate compensation previously made, and, consequently, there would be a violation of article 105 of the constitution."

Now, in the present controversy, it is claimed: that the sole consideration of the judgment at stake was the prospective benefit to accrue by the contemplated execution of the projected work and the consequent enhancement of value of the land to the extent at least of the amount levied upon it; that whatever work has been done

by the commissioners, or the city, has been a detriment, rather
540 than a benefit to the lands of the plaintiffs; that the work has been abandoned and that there is no probability that it will be resumed; that whatever taxes might be collected would go, not towards the completion of the scheme, but to the satisfaction of the warrants in question; that all the labor expended in the first drainage district has been paid for; that there are no drainage warrants outstanding for the work said to have been executed in the first district, except for the insignificant sum of $450; that the judgment of homologation was of the tableau for the first drainage district, the proceeds applicable to the same; that the claim of interveners is under warrants issued for liabilities of other districts, and finally, in substance, that the consideration of the judgment having failed, it cannot be enforced.

We have considered the statement which the district judge has systematically made of facts found by him; we have compared it with the oral and written evidence introduced on the trial of the case and we find that the averments made by the plaintiffs are established, touching the absence of any benefit derived from the contemplated drainage; injury sustained in consequence of what work was done; the nature and condition of their property which is almost entirely and always under water, a place of resort for water fowl, hunting and fishing; the absence of any outstanding warrant for work of any kind done in the first drainage district, except for a small amount; the abandonment of all drainage work; the disposal of all drainage apparatus; the impotency of the city to resume the enterprise; the value of the property on which the tax is assessed, which is shown to be at best one-tenth of the amount of the claim with charges superadded.

In presence of such a state of facts, can it be insisted, in good conscience and in equity, that the judgment enjoined shall be enforced?

In answer we are confronted with the saying of our immediate predecessors in the case of The Canal Bank *vs.* New Orleans, 30 An., 1376, wherein they ask whether if they were to consider, as exclusive evidence, the declarations contained in the acts of 1877, that would be sufficient to establish that the work contracted for and done, has not been performed according to the terms of the contract, and that every outstanding warrant given as the price of that work is without consideration?

In answer to the formal question put by themselves, viz: "Would those declarations, if taken as evidence, be sufficient to justify the court to pronounce in this suit, that, in whosoever hands those warrants may have passed * * * they are invalid and void, worthless as to the creditors, binding on no one, and that every guarantee mortgage and privilege securing their payment must be cancelled, erased and destroyed," they have answered: "We think not." 30th A., 1376.

The suit wherein this language is found was one in which the plaintiff was seeking the reimbursement of a sum of money paid without compulsion as a drainage tax. The ground for repetition

was: Want of consideration and subsequent release from the
541 tax and all liability by the legislation of 1877, previously noted. The court did not stop there. They ended the opinion by saying: "We concluded that plaintiff has not shown that its drainage taxes were levied and paid without consideration and that it was shown, in so far as defendant is concerned, that said taxes were voluntarily paid and properly disposed of.

The warrant-holder who had intervened was dismissed on the ground that as no judgment susceptible of being rendered could affect him, he had no foundation upon which to stand and therefore no interest to assert and protect in that litigation.

The putting and answering of the question were uncalled for. The matter was not discussed. It was not necessary to consider it at all, for the determination of the issue presented, which was simply the return *vel non* to the plaintiffs of a sum of money willingly paid as a drainage tax, the ground of repetition being, as already observed, want of consideration. The language used on the occasion must therefore be taken merely as obiter.

Under the authority in 11 An., 370, which underlies the rulings in 27th An., 21, we are of a different opinion and consider that, where the consideration of a judgment is prospective and has failed, the eventual debtor is, both in law and in equity, entitled to relief and to consequent exoneration.

That authority and the conclusions to which we have arrived are supported by text writers and a long line of decisions, in a number of our sister States, declaring assessments void, because the benefit to the property could not be seen and traced. In all the cases, in which it was clear that the district had received no benefit, the courts have, without hesitation, interfered.

On this subject, Mr. Cooley, in his work on Taxation, says: "The levy is made on the supposition that the estate, having received the benefit of a public improvement, ought to relieve the public from its expenses. In such a case, if the owner can have his land taken from him, for a supposed benefit to the land, which if the land is sold for a tax, it is thus conclusively shown he has not received—and he then be held liable for the deficiency in the assessment, the injustice, not to say the tyranny, is manifest." Cooley on Taxation, 471-'3.

Judge Burroughs, in his treatise on the same subject, writes more pointedly: "If there can be a personal assessment or the owner can be made personally liable for the tax thus imposed, then we have the remarkable result that for a tax which is imposed on a lot of land, upon the theory that its pecuniary value is increased by the improvement, the lot may be sold and, if there is a deficiency, the owner may be required to pay it; or, in other words, for the benefit conferred on the property, the property may be confiscated and the owner, for the privilege of having it confiscated, may be required to pay a tax into the treasury of the city." Burroughs on Taxation, p. 475 V., also p. 38, par. 30, 39; 459, par. 145, 146, 147; p. 466, 474.

31 Cal., 240, 254; 41 Cal., 525; 49 Cal., 546; 41 N. Y., 123, 126,

133; 36 Mo., 456; 50 Mo., 525; 56 Mo., 286, 350; 58 Penn.,
542 320; 1 Gill, 480; 5 Gilman, 416; 59 Main, 80; 3 Bush, 416,
423, 667; 4 Bush, 587; 34 Ill., 203; 24 Miss., 497.

Finding such to be the case in the present controversy we concur with our learned brother of the district court, in the conclusions which he has reached in favor of plaintiffs.

As the judgment sought to be executed by the city has become inoperative and so cannot be enforced and as the claim of the interveners hinges and is contingent upon that of the city, the unavoidable consequence is that the intervention must fail with the main defense asking the execution of the judgment enjoined.

We say that the claim of the interveners is based upon that of the city, for the reason, which they themselves aver in their pleadings and assert in argument, that, under the laws by virtue of which the warrants were issued, and also of the intervening constitutional amendments of 1874, they can only be paid out of the drainage taxes realized.

If the statutes and the amendment constitute a contract in their favor, it is one which by its very terms is subordinate to the collection of drainage taxes legally due and exigible.

Where no such taxes are demandable, the contract whatever it be and the rights averred under it, necessarily fall through.

There exists a marked disparity between the present case and that of the State *ex rel.* Martin *vs.* Police Jury, Caddo Parish, 32nd Ann., 1022, to which our attention has been called by the learned counsel of defendant and interveners.

In that case bonds had been issued, with legislative sanction in exchange of scrips and evidences of parochial indebtedness emitted from consideration but without legal authority. They had been made payable by the parish, in a manner indicated, but without restriction as to the source of payment.

Hence on the refusal of the municipal authorities to levy the tax provided by the law and asked by the bondholders, a mandamus was allowed.

In the present instance, if the warrants held and produced on the trial by the relators, for the amounts before stated, be legal and valid under the statutes of 1871 and that of 1876, and the constitutional amendment of 1874, the last act resting on the former and on the amendment, no provision of subsequent law has been referred to, directing them to be paid in a manner — from that mentioned in the statutes and in the amendment.

The payment of those warrants is, therefore, to be regulated by the provisions of the authority under which they were issued, and that authority expressly confines it exclusively to a special fund, when realized, and if realized. It is to take place only from the drainage assessment or taxes, "and not otherwise." The payment was, therefore, to be completely hypothecal, contingent upon eventualities susceptible of happening or not and was glaringly restricted by well-defined limitations.

The want of analogy between the two cases is manifest, both as to the facts and as to the law.

While charging an improvement of their alleged contracts,
543 the interveners cannot be heard to ask to be permitted to assail and destroy its integrity, by demanding over and above that which may have been covenanted. 33rd A., 386.

Their contract if it exists, and whatever it be, is the law controlling their rights.

It is, therefore, ordered and decreed that the judgment appealed from be affirmed with costs.

Rehearing refused.

Clerk's Certificate.

UNITED STATES OF AMERICA,
State of Louisiana.

Supreme Court of the State of Louisiana.

I hereby certify the foregoing to contain true extracts from the record of the proceedings had in the civil district court for the parish of Orleans, in a certain suit wherein Henrietta Davidson, *et als.*, were plaintiffs, and City of New Orleans was defendant, which record is on the files of this court under No. 8260, and also a true copy of the opinion and decree delivered by this court in said suit.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at the city of New Orleans this the fourteenth day of January, anno Domini, one thousand eight hundred and ninety-eight, and in the one hundred and twenty-second year of the Independence of the United States of America.

(Signed) T. McC. HYMAN, *Clerk.*

Agreement Marked Defendant S.

Filed January 17, 1898.

United States Circuit Court, Eastern District of Louisiana.

JOHN G. WARNER
vs.
CITY OF NEW ORLEANS. } No. 12350.

It is admitted that the total assessments made in the fourth drainage district were as follows:

Against private property	$215,460.04
Against streets, public squares and the like	65,956.77
Total	$281,416.81

(Signed) R. DE GRAY,
Solicitor for Compl't.

Jan'y 3, '97.

544 *Decree.*

Entered and Filed March 8, 1898.

Circuit Court of the United States, Eastern District of Louisiana.

JOHN G. WARNER
vs.
THE CITY OF NEW ORLEANS. } No. 12350. In Equity.

This cause came on to be heard at this term upon the bill, amended bill, exhibits, answer, replication, proofs and testimony, and was argued by the solicitors for the respective parties and submitted, when the court took the same under consideration;

Whereupon, and on consideration thereof, and for reasons orally assigned, it is ordered, adjudged and decreed that there be judgment in favor of the defendant, The City of New Orleans, dismissing this suit with costs.

(Signed) CHARLES PARLANGE, *Judge.*

March 8, 1898.
(Copy.)

Motion and Order of Appeal.

Entered and Filed March 12th, 1898.

JOHN G. WARNER
vs.
CITY OF NEW ORLEANS. } No. 12350.

On motion of Richard De Gray and John G. Rouse and William Grant, solicitors for complainant, made in open court, and on suggesting to the court that there is error in the final decree of this court rendered and signed on the — day of March, 1898, to the prejudice of said complainant, and that he desires to appeal therefrom, the assignment of errors this day filed being duly considered.

It is ordered in open court that complainant be allowed an appeal from said decree with supersedeas, returnable to the United States circuit court of appeals for the fifth circuit, within thirty days from the date of the entry hereof, upon furnishing bond conditioned according to law in the sum of two hundred and fifty dollars, with good and solvent security.

(Signed) CHARLES PARLANGE, *U. S. Judge.*

March 12, 1898.

545 (Copy.)

Assignment of Errors.

Filed March 12th, 1898.

Circuit Court of the United States, Eastern District of Louisiana.

JOHN G. WARNER
vs.
CITY OF NEW ORLEANS. } No. 12350.

Assignment of errors of John G. Warner, appellant.

1st. The circuit court erred in not rendering a decree upon the pleadings and evidence in favor of the complainant, and in decreeing in favor of the respondent upon the same pleading and evidence.

2nd. The court erred in holding that the assessments, reduced to judgments, against the city of New Orleans as assessee of the streets, squares and other public places are void, and that said city is not bound to account therefor in this proceeding, for the purpose of paying for the warrants sued on herein and others of the same character.

3rd. Said assessments having been confirmed by act No. 30 of the legislature of the State of Louisiana, and made exigible as part of the drainage fund applicable to the payment of drainage warrants, the circuit court erred in not holding that all irregularities and nullities in said assessments, if any existed, were cured by said act.

4th. The circuit court erred in not holding the city of New Orleans liable for the amount of said assessments, even if such assessments did not bear lien and privilege on the streets and squares.

5th. The circuit court erred in not holding that said act 30 of 1871 in casting said liability upon the city of New Orleans, granted by necessary implication authority to, and made it the duty of the city, to levy a general tax to discharge such liability.

6th. It appearing from the pleadings and proof that the city of New Orleans purchased from Warren Van Norden dredge-boats and other drainage machinery to the value of $300,000, under the authority of the act No. 16 of 1876 of the legislature of Louisiana, and issued warrants to him, including the warrants herein sued on in payment of the purchase price, payable out of drainage assessments, and that at the date of said purchase on June 7, 1876, said assessments, and the judgments thereon against the city and other assessments and judgments were then extant and outstanding and unsatisfied to a large amount, to which, as is shown by the uncontradicted evidence of said Van Norden and E. C. Palmer, the vendor looked, and upon which he relied for payment, the circuit court erred in not holding the said city estopped to deny the validity of said as-

sessments and judgments against itself, by virtue of the cov-
546 enants expressed and implied, contained in the agreement of sale.

7th. The circuit court erred in holding that the city of New Orleans was under no obligation, legal or equitable, notwithstanding the instruction of the supreme court, and the decision of the circuit court of appeals based thereon, all rendered in this case, to complete the drainage work after its purchase of said dredge-boats, machinery, &c., from Warner Van Norden, for the purpose of earning and making available the drainage assessments against private persons and property, out of which the price of said property could be paid; and in holding that the city might abandon the work of drainage at any time and render the assessments worthless, notwithstanding the covenants contained in said agreement, without being compelled to account for such taxes as trustee, or to contribute to the drainage fund a sufficient amount of the assessments against itself to pay the warrants issued in payment of said purchase price.

8th. The city of New Orleans by the express and implied covenants contained in the agreement by which she purchased the dredge-boats and machinery bound itself to complete the drainage work and make the assessments available for the payment of the warrants issued for the purchase price, or if it elected to abandon the work, in consequence of which the assessments could not be collected, to account for them and to contribute to the fund a sufficient amount of the assessments against itself to pay said warrants; and the circuit court erred in deciding to the contrary.

9th. The circuit court erred in holding that the city of New Orleans can avoid its liability as assessee to the holders of purchase warrants by pleading failure of consideration of the assessments and judgments, resulting from its own abandonment of the drainage work, contrary to the principle announced by the supreme court in this suit.

10th. The city of New Orleans having been a debtor to the drainage fund at the date of the amendment to the constitution of the State, adopted in 1874, and the amendment having excepted drainage assessments from the provisions limiting the debt of the city, such amendment was an express sanction and affirmance of said assessments as a debt of the city payable to the drainage fund, and otherwise subject to disposition by the legislature, unaffected by said limitation, and the circuit court erred in holding to the contrary, and refusing to decree the city to account for said assessments in this case.

11th. The city of New Orleans not having at any time disavowed the express trust created by the voluntary agreement by which it purchased the dredge-boats and machinery, but having constantly recognized and confirmed the trust by collecting drainage taxes and accounting for the same up to 1891, as appears from defendant's answer and the proofs, the circuit court erred in sustaining the pleas of prescription of five and ten years.

12th. The circuit court erred in not decreeing the city of

547 New Orleans to account for the drainage assessments collected from the commissioners of the city park, amounting to $26,725.90.

13th. The circuit court erred in allowing the bonds issued by the city of New Orleans, under act 73 of 1872, to the amount of $1,672,105.21, as an offset and discharge of its liability to the drainage fund, contrary to the decision of the supreme court and the United States circuit court of appeals in this case.

14th. The circuit court erred in holding that the decree rendered by the court in the case of James W. Peake *vs.* The City of New Orleans, to which the complainant was not a party, and affirmed by the Supreme Court of the United States, 139 U. S. R., page 342, is *res adjudicata* as to complainant's rights, and bars relief in this case.

15th. The circuit court erred in refusing to recognize the validity of the judgments of the State court homologating the assessments against the city of New Orleans, levied on its streets and squares, which judgments were beyond attack in this court and suit, where but two questions are open for inquiry, to wit: jurisdiction of the court rendering the same, and day in court, and in going beyond said judgments and inquiring into the original liability *vel non* on which they were based, and in holding that though said judgments were rendered in a court of competent jurisdiction, and after due hearing, were null and void.

16th. The circuit court erred in holding that notwithstanding the instruction of the Supreme Court of the U. S. — circuit court of appeals to the effect that under the warranties expressed and implied as contained in the bill of sale, and under the averments in the bill of complaint (now fully proved), the defendant was estopped from pleading against the complainant, the issue of said bonds to retire $1,672,105.21 issued prior to said sale, as a discharge * * * from her own liability to the drainage fund as assessee of the streets and squares, said courts had not necessarily declared said city's obligation as such assessee valid and binding, but that in fact the question submitted by the court of appeals to the Supreme Court was not based upon an actual liability, but that it in fact was but a moot court question.

Wherefore, and because of said errors, and other errors apparent on the face of the record, appellant prays that the final decree appealed from be reversed, set aside and annulled, and that the circuit court may be directed to enter a decree in his favor as prayed in his bill as amended, and he prays for all such other and further relief and redress as the nature of his case requires.

(Signed) RICHARD DE GRAY,
(Signed) ROUSE & GRANT,
Solicitors for Appellant.

548 *Bond.*

Filed March 12th, 1898.

Know all men by these presents, that we, John G. Warner, as principal, and F. J. Gasquet, as surety, are held and firmly bound unto the City of New Orleans in the full and just sum of two hundred and fifty dollars, to be paid to the said City of New Orleans, its certain attorney, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 12th day of March, in the year of our Lord one thousand eight hundred and ninety-eight.

Whereas lately, at a term of the circuit court of the United States for the eastern district of Louisiana, in a suit pending in said court between John G. Warner, complainant, and The City of New Orleans, defendant, a decree was rendered against the said John G. Warner, and the said John G. Warner having obtained an appeal to reverse the decree in the aforesaid suit and a citation, directed to the said City of New Orleans, citing and admonishing it to be and appear before the United States court of appeals for the fifth circuit, to be holden at New Orleans, Louisiana, within thirty days from the date thereof:

Now, the condition of the above obligation is such that if the said John G. Warner shall prosecute to effect, and answer all damages and costs if he fail to make plea good, then the above obligation to be void; else to remain in full force and virtue.

(Signed) JOHN G. WARNER, [SEAL.]
By R. DE GRAY, *Solicitor.* [SEAL.]
(Signed) F. J. GASQUET. [SEAL.]

Sealed and delivered in presence of—
(Signed) E. M. FULLER.

Approved by—
(Signed) CHARLES PARLANGE, *U. S. Judge.*

UNITED STATES OF AMERICA:

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana.

CLERK'S OFFICE.

I, Edward R. Hunt, clerk of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, do hereby certify, that the foregoing 482 pages contain and form a full, complete, true and perfect transcript of the record and proceedings had, together with all the evidence adduced on the trial in the case of John G. Warner *vs.* The City of New Orleans, No. 12350 of the docket of the said court.

549 Witness my hand and the seal of said court, at the city of New Orleans, this 12 day of March, A. D. 1898.

[SEAL.] E. R. HUNT, *Clerk.*

I, Charles Parlange, United States judge for the eastern district of Louisiana, do certify that Edward R. Hunt, whose name is signed to the above certificate as clerk of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, was, at the time of signing said certificate, and is now the clerk of said court. That said certificate is in due form of law, and that full faith and credit are due to his official attestations as such clerk.

Given under my hand, at the city of New Orleans, in said district, this 12th day of March, A. D. 1898.

CHARLES PARLANGE, *Judge.*

(Endorsed:) Filed March 12, 1898. J. M. McKee, clerk.

United States Circuit Court of Appeals, Fifth Circuit, November Term, 1897.

TUESDAY, *April* 12, 1898.

(Extract from the Minutes.)

JOHN G. WARNER
v.
CITY OF NEW ORLEANS. } No. 691.

This cause was regularly called this day, and, after argument by Mr. Richard De Gray, for appellant, and by Mr. S. L. Gilmore and Mr. Branch K. Miller, for appellee, the further argument was postponed until tomorrow.

November Term, 1897.

WEDNESDAY, *April* 13, 1898.

(Extract from Minutes.)

JOHN G. WARNER
v.
CITY OF NEW ORLEANS.

This cause came on again to be heard this day and was submitted to the court after further argument by Mr. Branch K. Miller, for appellee, and Mr. Wm. Grant, for appellant.

550 November Term, 1897.

TUESDAY, *May* 17, 1898.

(Extract from Minutes.)

Decree.

JOHN G. WARNER
v.
THE CITY OF NEW ORLEANS.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the eastern district of Louisiana and was argued by counsel.

On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said circuit court in this cause be, and the same is hereby, reversed and this cause remanded to said circuit court with instructions to enter a decree as follows, to wit:

"1. It is decreed that the city of New Orleans is a debtor to John G. Warner, complainant, in the sum of $6,000, with 8 % interest thereon from June 6, 1876, as stipulated in the warrants sued on, and that he is entitled to be paid said sum in principal and interest out of the drainage assessments set forth in the bill filed herein.

2. The said drainage assessments, including those against the defendant, as assessee of the streets, squares, and other public places, as well as those against the owners of private property, be, and the same are hereby, declared to constitute a trust fund in the hands of the city of New Orleans for the purpose of paying the claims of complainant and other holders of the same class of warrants issued under the act of sale from Warner Van Norden, transferee, to said city under authority of act No. 16 of the legislature of the State of Louisiana approved February 24, 1876.

3. That it be referred to one of the masters of the court to take and state an account of all said drainage assessments, and for that purpose he is authorized to require the production before him of the assessment-rolls and other records appertaining to such drainage assessments by any person having possession thereof and to examine witnesses touching all such matters.

In taking and stating said account the master is directed to charge the defendant as well with the amount of drainage assessments against the city on the areas of the streets, squares, and public places as with those against the owners of private property, with interest thereon as prescribed by law, and to give credit only for the sums already collected and properly expended by the defendant in the execution of the trust, but that no offset be allowed for the bonds issued in exchange for drainage warrants under the act of 1872.

It is further ordered that said master give thirty days' notice, by advertisement in a newspaper published in the city of New Orleans, to all holders of warrants issued as aforesaid, to appear before him and establish their claims.

551 And it is further ordered that said warrant-holders be entitled to establish their claims before ths master in the first instance, without being required to file formal interventions or to obtain special leave of the court, and that they be entitled upon making satisfactory proof to the full benefit of the proceeding.

5. It is further decreed that upon the coming in of the master's report and its confirmation the complainant and all those who have established their claims under the fourth clause of this decree will be entitled to an absolute decree against the defendant for the amounts found due them, if the fund established by the accounting shall be sufficient, but if not sufficient to pay such claims in full, then for the proper *pro rata* thereof, and shall be entitled to have execution therefor.

It is further ordered that the complainant and all other parties in interesst have leave to apply to the court for such other and further orders as may be necessary from time to time to carry this decree into full effect, and that the defendant pay all costs of this suit."

It is further decreed that the defendant, The City of New Orleans, be condemned to pay the costs of this cause in this court, for which execution may be issued out of said circuit court.

Petition for Rehearing.

United States Circuit Court of Appeals, Fifth Circuit, November Term, 1897.

JOHN G. WARNER, Appellant,
versus
CITY OF NEW ORLEANS, Appellee. } No. 691.

Appeal from United States circuit court, eastern district of Louisiana.

To the honorable the judges of the circuit court of appeals of the United States for the fifth circuit:

The petition of The City of New Orleans, appellee, respectfully shows—

That there is manifest error to the prejudice of your petitioner in the opinion and decree of this honorable court, rendered May 17th, 1898, in the following particulars, to wit:

First. That the court erred in holding that all of the defenses set up in the answer had been ruled upon adversely by the Supreme Court in the case of John G. Warner *vs.* City of New Orleans, reported in 167 U. S., page 467.

Second. That the court erred in holding that the only fact in dispute between the parties is the question of responsibility for the alleged defects in the drainage plans; that the answer shows that there are other distinct issues made here which formed no part of the pleadings when the demurrer was heard, namely, the non-

552 liability of the city for assessment against streets, public squares and property of a like character; the effect of the amendment to the constitution of the State of Louisiana of 1874, and the plea of prescription and *res judicata*; that while the case of Peake *vs.* City of New Orleans was pleaded in the demurrer as *res judicata* of the present case, the showing on the demurrer in this respect was widely different from that made at present, namely: the record of the Peake case, on the demurrer was not before the court, could only be sustained by evidence, and hence, the court could on the demurrer have no knowledge of its scope; in any event, the part of the case of Peake relied upon to sustain the plea of *res judicata* was the intervention of James Jackson, and the plea therein, which could by no process whatever be brought to the notice of the court on the demurrer, in consequence of which the overruling of the demurrer cannot be considered as overruling the plea of *res judicata*.

Third. That the court erred in holding that the defects in the drainage plan were attributable to the fault of the city.

Fourth. That the court erred in holding that the city was a trustee as to the so-called assessments and the judgments therefor, against streets, squares and public property of a like character.

Fifth. That the court erred in holding that the city, by drawing warrants against the drainage fund, was estopped to deny the existence and validity of the said assessments against public property, and if the court intended to hold, independent of the estoppel it declares, that the said assessments on streets, public squares, and property of a like character, were valid, or were made by any authority of law, or had any binding effect against the city, it also erred in this regard; and if it reached the conclusion that any validity or binding force was given to said assessments by the judgments of homologation set out in the bill, it also erred.

Sixth. That the court erred in finding that the cases of the New Orleans Drainage Co., 11 An., 338; Marquez *vs.* City of — Orleans, 13 An., 319; Correjolles *vs.* Succession of Foucher, 26 An., 362; Barber Asphalt Paving Co. *vs.* Gogreve, 41 An., 259, were any authority on the question of the liability of public property to local assessment, or that the decisions of those cases had any controlling or other influence on the issues involved here; likewise as to the cases of McLean *vs.* City of Bloomington, 106 Ills., 209.

Seventh, That the court erred in holding that the assessments on said public property constituted a lawful debt of the city, which must be discharged by the exercise of the power of taxation.

Eighth. That the court erred in holding that the constitutional amendment of 1874 was not a complete defense to this suit; that while the said amendment permitted the issue of drainage warrants, the same, by the express terms of the amendment, as to their payment were restricted to drainage taxes alone; the amendment allowing this mode of payment, "and not otherwise;" this was an express denial of any power in the city, by any process whatever, to become the absolute debtor of the said warrants; and in any event, the proviso of the amendment as regards the drainage war-

rants extended no further than to those issued under act No. 30, of 1871, and by no interpretation could be held to include
553 warrant issued under the subsequent act No. 16, of 1876; that the said assessments against public property were not confirmed by act No. 30, of 1871, such confirmation as may have been given by said act having reference exclusively to assessments against private property; that the authority to draw drainage warrants allowed by the amendment does not imply, as is declared by the court, an affirmance either of the validity of the assessments against streets and other public property or of the right of the city to proceed to the completion of drainage work then in progress, the said work at the time of the adoption of the amendment being exclusively in the hands of Van Norden, transferree of the Mississippi & Mexican Gulf Ship Canal Company, to the doing of which the city had no relation whatever, and to which it was a perfect stranger, until its purchase under the act of 1876, some two years and a half after the amendment was adopted; that the city was absolutely without power to increase her debt by the purchase of 1876, or by any of the consequences thereof, and the effect of the constitutional prohibition could not be avoided by an error of law, or otherwise.

Ninth. That the court erred in overruling or refusing to maintain the plea of prescription as to the assessments against public property, and the judgments homologating the same; that as to these the city was not a trustee, but at most, under complainant's contention, a mere debtor, and even this is distinctly denied by defendant; that whether or not the said assessments and judgments are prescribed is to be determined by the law of prescription in the State of Louisiana; that the statutes of limitations of the several States, and the interpretation given them by the highest court of the State in question, are binding as rules of decision in the Federal courts; that the laws of prescription of the State of Louisiana, and their construction given by the supreme court of this State, so far as they operate as a release from debt, depend for their application solely upon the lapse of the time required; that good faith or bad faith, trusteeship, or other like matters, are not considered; the mere passing of the time of the statute, without further condition, constitutes a complete defense; hence, even if the city, as erroneously held by your honors, was a trustee, the plea of prescription as against the said assessments against private property, and the judgments therefor, should have been maintained; that the case of Insurance Co. *vs.* Pike, 32 An., 483, is wholly inapplicable to this case, as concerns the said assessments against public property, and the judgments therefor; that the city has not averred in its answer that it has constantly endeavored, by suits and otherwise, to collect *these assessments*, but on the contrary, the answer expressly denies that they had or ever had any validity or binding force; that the averments of the collection and accounting for taxes set up in the answer, are limited in terms to the assessments against private property; therefore, the conclusion of the court that the city by its efforts to collect has affirmed the trust as to the assessments against

herself, is error; that the city does not plead its own neglect, to have kept the judgments against herself alive by bringing suits
554 for their revival; that as a matter of fact she could not have done so, it being in law, inconceivable that she, as a plaintiff, could bring a suit against herself, as a defendant to revive a judgment against herself; that this would not leave complainant without remedy, as by article 3547 of the Revised Civil Code any person interested in a judgment may bring a suit for its revival; so that it is the warrant-holders and not the city who have allowed the said judgments to prescribe, the city was absolutely without power to revive them, while the warrant-holders were free to have done so; in consequence of this, and other considerations, the cases of the Succession of Farmer, 32 An., 1037, McKnight *vs.* Calhoun, 36 An., 408, to the effect that prescription as to debts due by a succession to its administrator, and *vice versa*, is suspended while the obligation continues, are without application here; that whether or not the assessments as originally made are subject to prescription, and defendant insists that they are, they have, by the averments of complainant, passed into judgments, and by *merger* have lost their original character; and that the judgments are subject to prescription is apparent from the textual provisions of article 3547, Revised Civil Code; the case of Reed *vs.* His Creditors, 39 An., 115, citing State *vs.* Jackson, 34 An., 178, and Davidson *vs.* Lindop, 36 An., 767, construing, as they do, the particular provisions of special statutes presenting no feature in common with those presented here, the statutes interpreted by these cases, different from those involved here, expressly provide that the taxes levied thereunder shall not be subject to prescription, and furnish no authority upon the question of prescription here at issue.

Tenth. That the court is in error in declaring that the only remaining consideration which requires its consideration, after having disposed of those preceding, was that of prescription; that defendant, besides the other defenses, has pleaded the exception of *res judicata*, based upon the opinions and decrees of the Supreme Court and of this honorable court in the case of J. W. Peake *vs.* City of New Orleans, No. 11614 of the docket of this court, the opinion in which is found in 139 U. S., 342 (see Record, pp. 22 and 23); the opinions of your honors does not dispose of this defense; it does not appear to have been considered, and the attention of the court is respectfully asked to it.

Eleventh. That the court erred in holding that the city should not be allowed, in any event, the amount of its bond issue described in the answer, as a credit in her favor on any amount which she might hereafter be decreed to owe; that while it has been held by the Supreme Court that the bond issue could not be so treated, the opinion of the Supreme Court was based upon the question submitted for its consideration in this respect, which was made up from the record of the case as it then stood, namely, on an answer and a demurrer; the record at that time necessarily did not and could not make the showing of facts that is now before the court, namely, that Van Norden, the vendor of the city, received either

himself personally, or through his employees, assignees or transferees, the entire issue of bonds, and hence, could not plead ignorance of the fact that the drainage fund had been augmented to the extent of the issue of bonds; that this would remove the element of ignorance on his part, necessary to constitute an estoppel as against the city; that while the finding of the Supreme Court that the bond issue could not be treated as a defense, was on the demurrer, it does not extend to the exclusion of such defense under the evidence now disclosed by the record; the bill does not even aver that Van Norden was ignorant of the issue of bonds, but that he did not understand that its legal consequence was a diminution of the outstanding drainage fund, and that he did not anticipate at the time of the purchase that the city would make such claim; this, at most, would be an error of law, a lack of correct judgment as to the legal consequences of a certain act, against which the law of Louisiana does not relieve.

555

It should be noted also that what the Supreme Court said was based only upon the status of the bond issue, as shown by your honors' certificate, and not by the averments of the bill, the former being much narrower than the latter.

Twelfth. That, in Peake *vs.* City of New Orleans, 139 U. S., 342, the Supreme Court held that the city had the right to abandon the work of drainage, that such an abandonment was no cause of liability to warrant-holders; that while that opinion was with reference to work or construction warrants, it is equally applicable to the purchase warrants sued on herein, and that the city should be exonerated from any liability based upon the ground of the abandonment of said work, and in failing to give effect to this ground of the defense the court erred;

Wherefore, defendant and appellee, on the ground stated, and on others that may be hereafter assigned, respectfully prays that your honors will grant a rehearing in this cause, and for such other and further orders as in equity and good conscience your honors may be disposed to make.

SAM'L L. GILMORE,
BRANCH K. MILLER,
Solicitors for Appellee.

We hereby certify that the grounds assigned for the rehearing applied for, are good and sufficient, and that this application is not made for delay.

SAM'L L. GILMORE.
BRANCH K. MILLER.

Points and Authorities in Support of Application for Rehearing.

The following statement explanatory and elaborative of the points made in the petition for a rehearing is furnished the court for its convenience, and — which its notice is respectfully asked.

The serious consequences, grave and far-reaching, of your honors' opinion and decree in this case, a deep conviction that the strength

of its case has not been fully understood, and that your honors will give cheerful and attentive consideration to the reasons ad-
556 vanced to show that error has been committed, have induced the defendant to appeal to the court for a reconsideration of this cause.

If there were no other grounds upon which defendant could reasonably ask for further relief, it is apprehended that the court will welcome the opportunity to consider one of the defenses pleaded, that of *res judicata*, which is not noticed in its opinion, from which it is deemed not disrespectful, or otherwise improper, to infer, that through oversight it escaped your honors' attention.

The grounds upon which this application is based, however, are numerous, and avoiding a repetition of anything which may have been heretofore presented to your honors, either in the oral argument or the briefs of defendant, except so far as may be necessary to the understanding of this statement, the ground advanced for a rehearing will be explained as stated in the petition for a rehearing, which it may be said are mainly in the same order as they appear in your honors' opinion.

The first ground assigned for a rehearing, is the following: That the court erred in holding that all of the defenses set up in the answer had been ruled upon adversely by the Supreme Court in the case of John G. Warner *vs.* City of New Orleans, reported in 167 U. S., page 467.

In Warner *vs.* New Orleans, 167 U. S., 467, the Supreme Court was called upon to answer two specific questions; they were the following:

First. Is the city, under the express and implied warranties contained in the sale by which she acquired the property and franchises of Van Norden, and under the averments of the bill, estopped from pleading against the complainant the issue of $1,673,105.21 of bonds in retirement of drainage warrants issued prior to the sale, as a discharge of her obligation to account for drainage funds collected on private property, and as a discharge of her own liability to that fund as assessee of streets and squares?

Second. Should the decision in the case of Peake *vs.* New Orleans, 139 U. S., 342, be held to apply to the facts of this case, and operate to defeat the complainant's contention?

It should be noted that the question whether or not the city could plead the bond issue in payment, was to be answered on the averments of the bill; this is the express statement of the question; it is obvious that this court sought the instruction of the Supreme Court as to how it should dispose of this issue under the conditions stated in the bill, and not otherwise; taking the question as stated, it is perfectly apparent that if the answer sought, were given, it would apply solely to the case, disclosed by the averments of the bill, and none other; the status of the bond issue, if enlarged or otherwise modified by facts which did not appear in the bill, but which, for instance, are furnished by the answer and by the evidence, as the case stands now, could not be the subject as to which your honors sought instructions, differing as it would from the case con

templated by the question, namely, that stated "under the averments of the bill;" in other words, this court desired the instructions of the Supreme Court on the case made by the bill as
557 to the bond issue, and if the case in its present condition differs from or presents features not found in the bill, it is manifest that the case now before your honors is not that as to which you sought instructions.

In interpreting the effect of what was said by the Supreme Court it must be further borne in mind that it did not take into consideration the case stated by the bill, but that found in the certified questions; after declaring that the question was one of estoppel, it is said, "In order to a fuller understanding of it, a brief review of the facts is essential; and for these facts *we look simply to the statement prepared by the court of appeals and not to the bill and exhibits, copies of which are ordered to be sent to this court;*" see page 575. Italics ours.

After having thus stated the precise question which it proposed to answer, the court then proceeded to set out the same in detail, as follows: It recited the establishment of the boards of commissioners under the act of 1858, and the continuance of the work of drainage under it until 1871, when the boards were abolished, and the work transferred to the canal company; the duty of the city was to collect the assessments, and to draw warrants against the drainage fund for the payment of work; that Van Norden became the transferree of the company, and completed about two-thirds of the work, prior to February 23, 1876, when an act was passed authorizing the city to purchase from the canal company and its assignee all tools, etc., appertaining to the work, and also the franchises of the company, the price to be paid in drainage warrants, in the same manner and form as those theretofore; that there were then outstanding assessments to the amount of $1,699,637.37, of which $1,003,342.28 was assessed against individuals, and the balance against the city of New Orleans on streets and squares; that the drainage warrants issued prior to the purchase of 1876 had been paid by the issue of city bonds to the amount of $1,662,105.21; that the city elected to make the purchase authorized, which it did for a price of three hundred thousand dollars, payable in drainage warrants; the city covenanting not to obstruct or impede, but on the contrary to facilitate by all lawful means the collection of drainage assessments as provided by law, until said warrants had been fully paid, it being understood by the parties that the collection of assessments should not be diverted from the liquidation of the warrants until the same were fully and finally paid.

The Supreme Court thus states the facts and conditions under which it was to be determined whether the city was estopped to plead its bond issue as a payment; manifestly its judgment was addressed to no other fact besides those contained in its own statement of the question it intended to answer; in such statement it nowhere appears that the bonds were issued to and received by Van Norden, or those holding under him; this fact would obviously have had a controlling influence upon the court's opinion; we have

seen that at the time of the sale the total amount which could have been realized from the fund then outstanding, if every dollar of it had been collected, was $1,699.637.37, and if credit were re-
558 fused the city for the amount of its bonds, this would necessarily have made the fund larger by the amount of the bond issue, namely, $1,672,105.21, which had been received by Van Norden; it is evident that, in the view of the Supreme Court, its opinion was not formed with any reference to the fact, that Van Norden had already collected this sum from the drainage fund, and that its opinion was clearly based upon the supposition that it was received by some one else; unless the city be allowed a credit, the delivery of the bonds to Van Norden would have been a mere gratuity, which, as was said by the Supreme Court in the Peake case, would be *ultra vires* of the city; 139 U. S., page 349.

With the fact before it that Van Norden had already received, in bonds, an amount at least equal to the drainage fund, the Supreme Court would undoubtedly have said, in answer to the question, that the fund out of which his purchase warrants were payable, Van Norden had already obtained by anticipation, in bonds commanding a market value, instead of in drainage taxes, collected by piecemeal; and hence the enormity which the court finds in the city pleading the destruction of a fund out of which it had made its obligations payable, would not have been discovered; it would, rather, have said, that if the bond issue was in settlement, at least, of anything the city might owe as assessee of streets, there would only be the return by Van Norden, by his dredge-boats and purchase warrants, of the very large sum which he had previously received in advance out of the same fund; clearly, if Van Norden had been a stranger to the bond issue, if the bonds had not been received by him, but by some one else, and afterwards the city bought, making Van Norden's warrants payable out of the drainage fund, it would be inequitable in the worst decree to plead as to Van Norden, that the fund had been exhausted by payments to other parties; but widely different is the actual case, in which the bonds were delivered to Van Norden himself; it is inconceivable that if the Supreme Court had in mind the fact that it was into Van Norden's pocket that the bonds went, that it would have found in the case, the forbidden features so unfavorably commented upon in its opinion; it is impossible to believe that they would have said that Van Norden was entitled to receive over $1,600,000.00 of bonds in retirement of drainage warrants, when the fund out of which they were to be paid was of a smaller amount, and the whole situation to be treated as though no such transaction had occurred; in answer to the suggestion that the city by drawing the purchase warrants against the fund warranted its existence, there could be made the reply, true, there was a fund, but Van Norden had already drawn against it for a sum which, if charged against him, would have absorbed it; there would be nothing inequitable in allowing so large a value parted with by the city, to go in liquidation of any sum due by itself as assessee, whatever might be said as to taxes due by private property; if the bonds were received by Van

Norden otherwise than in discharge of something the city might possibly owe, it was a donation, which the Supreme Court in the Peake case, 139 U. S., p. 359, has said it had no right to make; to hold that the city would not be entitled to offset its liability as assessee, if such existed, by the bond issue, under the evidence showing that Van Norden himself received the bonds, is to affirm that Van Norden was entitled not only to receive full payment of his warrants, but entitled also to receive $1,672,105.21 in bonds without any consideration at all; we repeat, that the fact of Van Norden being the beneficiary of the bonds, was not in view by the Supreme Court under the certified questions in the case, and if it had been, the conclusion of the court would have been the reverse of what it was; it should be further noted that the statement of this part of the case contained in the bill, does not disclose the fact that the bonds were received by Van Norden; so this circumstance could not have been within the knowledge of the court, even if the bill had been consulted, as your honors, from your certificate, supposed it would.

There was a plea of *res judicata* made in the demurrer, but it could manifestly not be disposed of by the court, because it required evidence to sustain it; without the entire record, including the intervention of Jackson, and the pleadings in the case in which he obtained his judgment at law, which showed that his claim was upon purchase warrants, it would be impossible to either sustain or overrule the plea; there is an express reservation, as was proper, of any opinion on the subject, your finding being that the opinion and decree in the Peake case did not necessarily control the present case; it is impossible to construe this into a solemn finding that the plea of *res judicata* is unfounded.

The defense based upon the constitutional amendment of 1874 was not made in the demurrer; neither was the plea of prescription; so, it is confidently believed, that your honors will see at once your error in declaring that "as to nearly all of these defenses, we might well rest our decision in this case, on the opinion of the Supreme Court expressed in answer to the certified question," and it is more than manifest that in your own opinion and decree on the demurrer, you have decided nothing as to any of these defenses.

The second ground of the application for rehearing is, that your honors are in error in holding that the only fact in dispute between the parties, is the question of the responsibility for the failure of the drainage plan; it is deemed that nothing more is required than to bring to your notice the pleas made by the answer, they are; first, the non-liability of public property to drainage assessments; second, the prohibition of the constitutional amendment of 1874, forbidding the city to increase her debt in any manner or in any form, or under any pretext; third, prescription; fourth, *res judicata*.

The third ground urged for a rehearing is that your honors are in error in holding that the defects of the drainage plan were attributable to the fault of the city of New Orleans; this point has been so fully covered by the oral argument and the briefs filed herein, that it is deemed unnecessary to repeat those arguments; we respectfully

ask your honors to consider again what has been said and written upon this subject.

560 It is fourthly urged that your honors have erroneously held, that the city was a trustee of the so-called assessments, and the judgments therefor, against streets, squares and property of a like character; speaking of the city's abandonment of the work of drainage, you say in your opinion:

"Its conduct in these other respects was a violation of its duty as trustee, and was a breach of the covenant contained in the act of purchase, not to obstruct or impede, but on the contrary, to facilitate by all lawful means the collection of the drainage assessments."

"Treating the city, therefore, as a trustee, under the express duty to do whatever was reasonably required to make the drainage fund available for the payment of the purchase warrants, a court of equity will apply the maxim that equity looks upon that as done which ought to have been done. * * * The city must, therefore, be treated as having done whatever was necessary to render the assessments available, and should be held to account for the drainage fund as if collected and in hand."

We construe the concluding portion of that part of the opinion quoted as applying to assessments against private owners, as the duty of the city concerning the assessments against herself, if they are owing, which is denied, was not to collect, but to pay; her own indebtedness was not to be collected for the warrant-holders from anybody else, but was to be discharged as a debt, if debt it was; the process of collection can never be accomplished by a party against himself, but only with reference to another person; continuing, however, your honors say:

"It is claimed, however, that the city is not bound to account for the assessments and judgments against itself as a *quasi* owner of the streets and other public places, on the ground that such assessments and judgments should be considered void *ab initio*, for the reason that public property is exempt from taxation; but we think the city, by drawing these warrants against the drainage fund, composed largely of these very assessments and judgments, is, under the principles laid down by the Supreme Court in the present case, estopped to deny their existence and validity, to the same extent as it is estopped from setting up the issue of bonds, under the act of 1872, as a discharge of its general liability as *trustee*, with reference to the fund."

It may be premised that the defense set up is not simply that the public property in question is exempt from taxation, but also that it was not intended by the act of 1858 to be assessed for drainage taxes; your honors will observe that this part of the city's defense on this part of the case is not noticed in your opinion.

The claim that the city is a trustee, is based upon the provisions of act No. 30, of 1871, and more particularly upon those of section 9 of that act.

Defendant insists that by that statute, it is *not* made a trustee of the assessments against public property; that no intention is expressed or implied in any language that it contains; on the contrary,

from the circumstance that it is made a trustee as to assessments against private property, and no mention is made of those
561 against public property, its trusteeship as to the latter is completely negatived; and further, that the failure to mention assessments against streets, etc., either expressly or by inference, may be evidence that they were deemed invalid by the legislature; on the other hand, it is clear, that the assessments turned over were those against private owners alone; this is shown by the duty imposed upon the city; the act says, section 9, page 78, that the board of administrators, "be and are hereby authorized and directed to collect from the *holders of the property* within the said districts, the balance due on the assessments, as shown by the books of the first, second and third drainage districts, under the acts of March 15th, 1858, and March 17th, 1859, and the several acts supplementary and amendatory thereto, which *said assessments* are hereby confirmed and made exigible." Italics ours.

The same section says, page 77, that the board of draining commissioners, "shall transfer to the board of administrators of New Orleans, all moneys, assessments, and claims for drainage in their hands, or under their control * * * a true statement of the claims of said draining commissioners against the city, to be adjudicated and settled out of money *collected* by the city."

The claim that the assessments against the city were included in the assessments placed under the control of the board is seen to be entirely without force, when, reading further, it is ascertained what the city was directed to do with these assessments, namely, collect them from the *holders of property* within the districts, language which by no construction could mean anything else, than that the assessments so turned over, were those against the owners of private property, from whom the city was to make collections; the city surely was not to collect from itself as a holder of property; for a debtor to collect from himself a debtor, what is due to his creditor, and pay it over to the latter, is an incongruity, the imagination is unable to picture; if this mode of thought were pursued with reference to the holders of private property, the act would have declared it their duty to collect from themselves, and pay over to the city; nor is the "true statement of the claims of said drainage commissioners against the city, to be adjudicated and settled out of money collected by the city," a description which would comprehend the assessments against the city, as included in what the board was to receive; the assessments, had prior to 1871, passed into the judgments so strongly relied upon by complainant; and hence, there was nothing to be adjudicated upon; and in any event, the assessment on streets was not to be paid out of money collected by the city from any one, but out of its own funds.

If anything else were required to make it absolutely conclusive, that the trusteeship intended by the act of 1871 had no reference whatever to the assessments against public property, it would be found in the fact of the asserted transfer to the city of the assessments and judgments against herself; the city acquiring a debt

due by it to a creditor, the obligation would be extinguished by confusion.

562 "When the qualities of debtor and creditor are united in the same person there arises a confusion of right which extinguishes the obligation;" Revised Civil Code, article 2217.

To give the complainant the benefit of his contention on this point would go to the extent of showing, that if he ever had any claim against the city on this account, he had lost it by the terms of the act he relies upon as having confirmed and made it exigible.

It is no answer to say that the transfer was for the purpose of collecting the amounts; this is limited to assessments against the holders of property, in which category the city could by no interpretation be included; nothing could be accomplished for the warrant-holders by making the city transferee of the judgments against herself; it was indicated in the clearest manner that the assessments against public property were not contemplated by the act of 1871; whether because they were regarded as invalid or for any other reason need not be determined; the exigencies of defendant's case are sufficiently met in this regard, if the fact be, that the assessments against streets, squares, and property of a like character, were not as complainant insists, and your honors declare, confirmed and made exigible by the act of 1871; the construction of that statute here insisted upon by defendant, harmonizes with its argument that the act of 1858 did not intend that such property should be assessed; that the act of the commissioners in placing it upon the rolls was arbitrary and without legal effect, and that the judgments of homologation all on their face purporting to be rendered in accordance with the statutes authorizing the assessments, could have no greater effect than the statutes and assessments themselves; there would be as much authority for the commissioners to place upon the rolls property situated outside the drainage districts, as there would be to place thereon property within them, but not of the character which the statute intended to be assessed.

The fifth ground assigned for a rehearing is, that your honors erred in holding that the city, by drawing warrants against the drainage fund, was estopped to deny the existence and validity of the said assessments against public property.

With regard to the declaration in your honors' opinion, that the drawing of the money warrants against the drainage fund, composed largely of these very assessments and judgments, operated as an estoppel to deny their own existence, it is respectfully submitted that it assumes against defendant the entire matter at issue; the warrants were drawn against the drainage taxes, and in no particular was it undertaken to define what they were, nor is there any fair implication as to what taxes composed the fund; to draw a warrant against drainage taxes, without specification as to the property which is assessed, and the persons who are involved therein, while it might assume the existence of a fund of some sort, leaves entirely at large any question as to whether assessments against public property formed any part thereof; the physical existence of certain rolls on which streets and like property were assessed, does not in

the faintest degree import anything as to their legal effect, or that they had any; during the many years from 1858 to 1871 the
563 city had not paid one dollar of these so-called assessments, and during that period the municipality had enjoyed prosperous times; no warrant holder ever attempted to enforce against her, any right based upon the city or the streets, being liable to drainage taxes; Van Norden himself, in 1872, instead of, by mandamus and other proceeding, attempted to realize from the city the large sums now imagined to be due for assessments on public property, and thus realize in cash to the extent thereof, contented himself with obtaining relief by the city's bonds, which by the act under which they were issued he was required to take at a discount of twenty per cent.; instead of these assessments being confirmed by the act of 1871, as far as any fact can be declared and acquiesced in by silence and inaction, the non-liability of the city was fully established, not only by its own conduct, but by that of every holder of drainage warrant-, if, in 1876, as is declared by the bill, with reference to the failure of the city to prosecute the work of drainage, as shown by the evidence of Brown to be due in part to a lack of means, it had an unlimited power of taxation, it is extraordinary that Van Norden who at that time was a large holder, both of work and purchase warrants, abstained, for the purposes of paying the judgments against her, from any attempt to enforce the exercise of this power, by appropriate proceedings in the Federal court.

The sixth ground suggests the error of the court, in treating New Orleans Drainage Co., 11 An., 338, Marqueze *vs.* City of New Orleans, 13 An., 319, Correjolles *vs.* Foucher, 26 An., 362, and Barber Asphalt Co. *vs.* Gogreve, 21 An., 259, as establishing the liability of street and public property of a like character to local assessment; we have been at pains in our brief heretofore filed, in reply to complainant's brief, to carefully analyze these cases, and to show their radical difference from the one at bar.

With regard to New Orleans Draining Co., 11 An., 338, we are fortified by the opinion of the circuit court, to the extent of its saying, that the act of the commissioners in assessing public property was only *apparently* in accord with the views of the Supreme Court expressed in the draining company case, an opinion participated in by a distinguished member of the present bench.

The other suits involved claims against the city growing out of *special contracts* made by her, to which, of course, she gave her formal consent, in some instances her liability being likened to that of a warrantor, and all under special statutes presenting no features in common with those involved here; it is deemed unnecessary to repeat here the full and exhaustive argument made upon this subject in our reply brief, to which the attention of your honors in this connection is respectfully asked.

Nor is County of MacLean *vs.* City of Bloomington, 106 Ills., 209, of any controlling influence upon this question; in that case judgment was rendered against a court-house square, upon a special assessment for the improvement of an adjacent street; the objections were, first, that the property was exempt from special taxation;

second, that the statute under which the city was proceeding did not authorize the assessment; third, that the judgment could
564 not be enforced by the sale of the property, and no other mode of enforcing the payment could be resorted to.

The first ground was disposed of, page 213, by declaring that an exemption from *taxation* did not carry with it an exemption from special assessments.

The defendant here claims nothing inconsistent with this finding; the contention here is not that the property is exempt from local assessment, but that the statute of 1858 is no warrant for its assessment; the only necessity of referring to an exemption from taxation, is incidental to the argument that streets and public squares were free from the operation of the statute; it is not claimed here that the act of 1858 did assess public property, and that the assessments are invalid, because that class of property was exempt from assessment, but that the statute did not have such property in view, when the assessments were directed; in support of this argument it is to be considered that there is an implied, if not an express, exemption of all public property from public burdens; to levy an assessment against the streets, which is to be paid by the city, and not by the property, would be to tax the city in order to raise money to pay the assessments, which would be nothing more in effect than to tax the streets, since the sum raised from taxation by the city to pay the assessment would be a mere substitute for the charge against the property; this is referred to as a subordinate reason, besides those furnished by the terms themselves, as the act of 1858, in support of defendant's interpretation that it did not intend to assess public property; therefore, this point of the Illinois case is not adverse to the defense set up.

The decision then proceeds, page 213, to show that the General Assembly had the power to assess public property for local improvement; that the language of the act was comprehensive enough to include the court-house square in question; that its exemption and not its inclusion should specifically appear.

The argument of the defendant here is not only that the terms of the act of 1858 are not sufficiently comprehensive to include public property, but upon its face there is affirmative evidence of the most conclusive character, that public property was not contemplated, as also is the case with the act of 1861; these questions were fully argued in our original briefs, and again we presume to ask for them a re-examination by your honors, adding here only, that the act of 1858 intended to assess only property which had a definite owner, which is not descriptive of public property; it is not owned by the city, but belongs to the people, and of which the city is only an administrator for the public benefit; the act directs recorders of mortgages, in giving certificates of encumbrances on real estate, to report the drainage mortgage as having precedence over all conventional, legal, judicial and tacit mortgages, which is to affirm that a drainage mortgage attaches only to property which could be covered by the other mortgages named, from which class streets and public squares are excluded; it would be unnecessary to recite the order

of priority between the drainage mortgage and the others, unless in all cases they both encumbered the same class of property; the act of 1861 declares that the drainage taxes shall be collected in the ordinary way that judgments are executed, namely, by writ of *fieri facias;* no such writ would run against public property dedicated to the public use, from which it would result that the remedy for the collection of the taxes could not be applied to streets and public squares; from this it would be inferred that they were not to be assessed, as to make the assessments and provide no remedy for its enforcement, would be inconceivable; hence the conclusion that there was no purpose to assess public property.

The third proposition held by the Illinois case is that although the court-house square could not be sold under execution it should be paid for out of the public treasury.

Back of the decision lies the statute which it construed, as to the provisions of which the decision leaves us in the dark; it may be in effect possibly like the act of 1858, or that of 1861, or it may be wholly dissimilar to both; it may be fairly supposed from the opinion that it was much stronger in terms, and more direct in purpose than either of the statutes in issue here; but the opinion has no value without the act which it interprets; it is the construction of a statute of Illinois, which, if shown to be substantially the same as those of 1858 and 1861, might be authority to guide your honors in the construction of the latter; but to assume that the Illinois statute was so similar to those here involved as to make the interpretation of one authority for the construction of another, is to take everything for granted, and to decide the point upon the merest conjecture.

The seventh ground upon which the rehearing is sought is the finding of the court that the assessments against public property constitute a lawful debt of the city.

We have argued in our original briefs that the statutes of 1858 and 1861 gave no authority for the assessment of public property; that the act of the commissioners in placing such property upon the assessment-rolls was a mere act of power, done without authority; the commissioners themselves, like the taxes, being the mere creatures of statute, and having no right to assess any property save that directed by the statutes to be so assessed; that the judgments of homologation could have no greater effect than the statutes under which they were rendered; that by the very terms of the judgments they are limited in effect to the scope of the acts of 1858 and 1859, and without such limitation, expressed in the judgments, it would be implied; that the judgments of homologation mean what the statutes mean and no more; as has been said before, both the assessments and judgments have remained uncollected for many years, without any act on the part of the city looking to their payment, and without any effort until the present suit on the part of any warrant-holder, to enforce their collection; a stronger acquiescence by all interested parties in a construction of their mutual rights and obligations, could not be conceived; it

would be to no purpose to repeat here the arguments in our
566 original briefs to the effect that the assessments are not and never were due or owing by the city, and we respectfully refer your honors to the arguments in our original briefs on this point.

As the eighth ground for a rehearing, we respectfully suggest that the court was in error in holding that the constitutional amendment of 1874 was not a complete defense to that part of complainant's case which seeks to fix upon the city an absolute liability for the taxes due by private property, which are claimed to have been lost by the abandonment by the city of the drainage work, and her neglect in collecting.

Your honors say, by the terms of the amendment, it is expressly provided that it did not prevent the issue of drainage warrants to the transferee of the contract under act No. 30, of 1871, payable out of drainage taxes; but that it seems clear that by its provisions the amendment excludes, and intended to exclude from its operation the liability of the city growing out of its relation to drainage matters, including the city's liability as assessee of streets and public squares; and, further, that it would seem that the authority to issue warrants against the drainage fund, after the first of January, 1875, when the amendment went into effect, necessarily implied the right of the city to proceed to the completion of the drainage work then in progress, and imposed the corresponding duty on the city to collect and apply all drainage assessments to the payment of the warrants; your honors' opinion then says, that these taxes being liabilities of the city, cannot, by any course of reasoning be included in the clause prohibiting an increase of debt, without imputing to the authors of the constitution an intention to defraud those who might deal with it under the invitation of the constitution.

It is respectfully submitted, that your honors have totally misapprehended the proviso regarding the issue of drainage warrants; the amendment is as follows:

"Article —. The city of New Orleans shall not hereafter increase her debt, in any manner or form, or under any pretext. After the first day of January, 1875, no evidence of indebtedness or warrant for the payment of money shall be issued by any officer of said city, except against cash actually in the treasury; but this shall not be so construed as to prevent a renewal of matured bonds at par, or the issue of new bonds in exchange for other bonds, provided the city debt be not thereby increased, nor to prevent the issue of drainage warrants to the transferree of contract, under act No. 30, of 1871, payable only from drainage taxes, and not otherwise; any person violating the prohibitions (provisions) of this article, shall on conviction, be punished by imprisonment for not less than two nor more than ten years, and by fine of not less than three dollars nor more than ten thousand dollars."

In language so sweeping and exhaustive as to leave unsaid, nothing necessary to show what was the will of the people the city, after the first of January, 1875, is prohibited from increasing her debt, no matter under what pretext; she is deprived of all power to issue

any warrant except against cash actually in the treasury;
567 the proviso, which involves no permission to do anything which is forbidden by the preceding clauses of the article, gives her the power to issue drainage warrants to the transferree of the contract or (of the Mississippi and Mexican Gulf Ship Canal Company, Van Norden being the transferree), under the act No. 30, of 1871, *payable only from drainage taxes and not otherwise;* the prohibition against any increase of debt is recognized and affirmed, and studiously preserved, by the proviso; the warrants which are to be issued are not to be paid absolutely out of the city's general funds, but out of drainage taxes, and from no other source; in what sense does this amendment recognize the warrants as debts of this city? How can it be said that by the proviso the amendment intended to exclude from its operation the liability of the city growing out of its relation to drainage matters, when it never had any personal liability, and such liability, in emphatic terms, is excluded by the restriction of the payment of the warrants to drainage taxes alone? It would be impossible to erect a more impassable bar to any personal liability of the city, than to declare that the drainage warrants should be a charge only against the fund provided for their retirement, and that their payment should not be otherwise; to say that included in the proviso was the city's liability as assessee of streets and public places, is to again, assume the whole question which is here at issue, namely, whether such assessments ever had any legal existence; they are not mentioned in the proviso, and if it were intended that so large a liability were to be placed upon the city, it is incredible that such intention should be left to an inference of the vaguest character; the drainage taxes, when the constitutional amendment went into effect, were what they had been from the day they were levied; those assessed against the city were clearly illegal, which invalidity, as has been argued above, was by silence and inaction acquiesced in by the warrant-holders; the authority to draw warrants against the fund implied nothing as to what assessments composed the fund; your honors will, no doubt, appreciate and condone the surprise of defendant when it learned that the constitutional amendment, which had always been regarded as a protection against any increase of debt, should in its proviso regarding drainage warrants be treated as authority for that purpose; it is not claimed that the assessments against private property were at any time prior to the amendment, debts of the city, and if the amendment be given the effect it was manifestly intended to have, the defendant could not, even by contract, however formal or solemn, have made herself their debtor; still less could she, by abandoning the work of drainage, or by her negligence in collecting, as is charged in the bill, which occurred in 1876, subsequent to the amendment, have done by omission and indirection, what she was prohibited from doing by positive act.

It is apprehended that defendant will have no difficulty in convincing your honors that you are seriously in error in the statement in the opinion that the authority to issue warrants against the drainage fund, after the amendment was adopted, necessarily im-

plied an affirmance of the right of the city to proceed to the
568 completion of the drainage work, and imposed the corresponding duty on the city to collect and apply all drainage assessments to the payment of warrants; when the amendment was adopted, the drainage work was being conducted not by the city, but by Van Norden, as transferree of the company, he having acquired its rights in 1872, and continued in their exercise until 1876, when the purchase of the city was effected; the city when the amendment was adopted had nothing to do with the drainage work, and the suggestion in the opinion that it necessarily implied an affirmance of the right of the city to proceed with the completion of the work, is unwitting error; as to the imposition of any duty on the city to collect the assessments, the amendment added nothing more than was imposed by the act of 1871; it should be remembered that the city's duty to collect the private assessments has never been disputed; on the contrary, the averments of the answer and the evidence show, that she has proceeded with the collections with such results, as that all that can be reasonably collected, have been reduced to possession and accounted for; her contention as to these assessments is that by no act of negligence or omission of duty, if such there were, can she be made absolutely liable; she did not owe them before the constitutional amendment went into effect, and its prohibition was an absolute bar to her becoming a debtor by any process, after the first of January, 1875.

Touching the statement of the opinion that if the city's purchase created a debt in excess of the limitations, the most that could be said of it was that it was made in error of law, which, according to article 1846 of the Civil Code, cannot be alleged to acquire the property of another, it may be said that the error spoken of, article 1846, is the incident of a contract when there is capacity in both parties to make; one of the requisites of the validity of a contract is that the parties must be capable of contracting. See article 1779, *et seq.*, Revised Civil Code; the city was empowered to make the contract by the act of 1876, but this power must be exercised subordinately to the provision of the constitutional amendment, superior to any act of the legislature; the amendment left the city with the power to make any contract of purchase it had lawful authority to make, subject to the condition that it did not involve an increase of debt; this the city could not do, to whatever extent authorized or attempted to be authorized by the General Assembly.

Where there is a limitation of the power of a municipal corporation to incur debt, there is an absolute want of corporate life or capacity to override and avoid the prohibition, it matters not how great the necessity, or how expedient the step.

The constitutional amendment of 1874 prohibited the city from adding to its debt under any pretext whatsoever. The prohibition is sweeping and extends to any increase of debt in any manner or in any form; it matters not how necessary the work of drainage may be or may have been considered. The purpose of the amendment was to strip the city of any discretion whatsoever as to the

569 increase of its debt. The debt could not be augmented, however necessary in the city's judgment. Of all of this Van Norden had full notice when he sold to the city.

It matters not how great may be the necessity, real or apparent, for the city to incur debt beyond the constitutional limit, the prohibition, and not the necessity of the expense, controls. This is well settled by authority. A limitation on indebtedness imposed by constitution or by charter extends to all forms of debt, bonded or floating, and embraces all transactions which may involve or affect indebtedness of any kind beyond the limit allowed.

In Prince *vs.* Quincy, 105th Illinois, 138, the city undertook to contract for the construction of water works for a sum which, added to its existing indebtedness, exceeded the constitutional limit of 5 per cent. on its taxable property. It was claimed that a water supply was a necessary requirement of the city, and its provision was an item of ordinary current expense incident to the city's power of government and administration. While the necessity of the work was admitted, the court held the contract to be void, as beyond the constitutional power of the municipality. The court declared that the rule applied was well settled in Illinois and admitted of no exception, citing several decisions in support of its conclusion.

In Sacket *vs.* New Albany, 88 Indiana, 473, under a constitutional provision, in all respects similar to that of Louisiana, limiting municipal indebtedness of municipal corporations to 2 per cent. upon its taxable property, recovery for the price of a system of fire-alarm, the necessity and importance of which is readily seen, was denied on the ground that the contract, if permitted to stand, would create an indebtedness exceeding the limit. As in the case just cited, it was there contended that the contract should be upheld on the ground of the absolute requirement of a system of fire-alarm for the protection of property; but this was found insufficient to sustain the contract, in view of the limitation of indebtedness.

In Valparaiso *vs.* Gardner, 97 Indiana, 1, under a similar provision of the constitution, a like rule was affirmed, although in the particular case the contract in question was held not to be a debt, and hence removed from the limitation of indebtedness.

In National Bank *vs.* Independent District of Marshall, 39th Iowa, 490, the contract of a school board for the construction of a schoolhouse, a purpose directly within the powers of the board and obviously a necessary object for the performance of its duties, was declared void for the reason that its payment would be in excess over and above the indebtedness permitted by the constitution.

In Davis *vs.* Des Moines, 71st Iowa, 501, a local assessment for the construction of a sewer was contested by a property-owner on the ground that its cost would increase the city's debt, in violation of a constitutional provision by which it was limited to a certain amount. It was held that the assessment which was to be paid by the owners of the adjacent property was not a debt of the city, by reason of which it was not affected by the prohibition. On this ground the assessment was upheld, but the rule that all municipal

indebtedness in excess of the constitutional limit was void,
570 however necessary the public work for which it was contracted, was null and void, was declared.

This case is instructive in the present controversy. The drainage assessments as levied under the act of 1871 are fully recognized by the constitutional amendment of 1874. In this form they are not affected injuriously by the amendment; but any process by which they are to be converted into absolute debts of the city is in the teeth of the amendment, by which the city is prohibited from increasing her debt after the 1st of January, 1875, *in any form or in any manner, or under any pretext.* In the face of such absolute injunction, the failure of the city to complete the work of drainage and collect the assessments could not make it the debtor of the warrants sued upon. The amendment intended that not one dollar should be added to the city's debt, no matter what the pretense. It would amount to little, if mere neglect or failure of duty could bring about the very result which it was the purpose of the amendment to make impossible.

In Scott *vs.* Davenport, 34th Iowa, 208, the city was expressly authorized by its charter to construct a water-works plant. Here, too, the necessity of a water supply was imperative; yet, notwithstanding the express charter authority and the necessity of the work, the contract was annulled on the ground that it created an excess of indebtedness over and above the constitutional limit.

In Council Bluffs *vs.* Stewart, 51st Iowa, 385, proceedings for the opening of a street, the work to be paid for by an issue of bonds, were set aside on the ground that the bond issue would increase the municipal debt beyond the constitutional limit. The public requirements which necessitated the opening of the street were considered insufficient to remove the contract from the constitutional rule, the court holding that the limitation applied to all debts of every description, for whatsoever purpose contracted.

In the decisions mentioned there are cited many cases upon the question at issue; they are respectfully referred to the consideration of your honors.

See also Read *vs.* Atlantic City, 49 N. J. L., 558.

In appeal of City of Erie, 91st Pennsylvania St., 398, a contract for the construction of a market-house, a necessary adjunct of municipal government, was attacked on the ground that its price would add to the city's debt to an extent that would exceed the limit placed upon it by the constitution. The contract was held void on this ground.

The decision of the courts of last resort of Illinois, Indiana, Iowa, New Jersey and Pennsylvania, above cited, are in full accord with the jurisprudence of this court upon the same subject.

In Buchanan *vs.* Litchfield, 102d U. S., 278, bonds were issued in payment for the erection of water works; the bond issue with the existing municipal indebtedness exceeded the constitutional limit of 5 per cent. upon the taxable property of the city. Upon this ground the bonds were held void.

In Litchfield *vs.* Ballou, 114th U. S., 190, the contractor
571 who built the water works just mentioned, sued to recover the money expended in their construction. The bonds, as is seen, having been decreed invalid upon the same ground, namely, that the contract violated the constitutional limit of indebtedness, the relief sought was denied. The prime necessity of the work in question as a means of supplying the city's inhabitants with water was one of the conditions of the suit, but this in no respect hindered the court from maintaining the constitutional limitation of indebtedness.

In Doon Township *vs.* Cummings, 142d U. S., 366, bonds in excess of the constitutional limit were issued. They were, however, to be used in retiring previously existing debts, which were within the limit, and hence in the result there would have been no increase of debt. This court held, however, that there would be an undoubted increase in the interval between the issue of the bonds and the taking up of the old debt, and this violation of the constitution, though temporary, and as the initial step towards paying a lawful debt, could not on that account be excused (page 372); the bonds were declared void.

Ninthly, it is urged as a ground for a rehearing that the court erred in overruling or refusing to maintain the plea of prescription, as to the assessments against public property; that as to these the city was not a trustee, but at most, under complainant's contention, a mere debtor; that the statute of limitation or prescription of the State of Louisiana should be applied; and under it the mere lapse of time, without regard to other circumstances, is sufficient to establish the defense.

It was argued orally and in our original briefs, and shown by the evidence, that the judgments against the city were all rendered more than ten years prior to the filing of the bill in this cause; that by article 3547 of the Revised Civil Code of Louisiana judgments are prescribed by the lapse of such period; that the right to bring a suit for the revival of a judgment, prior to the expiration of the ten years, exists in favor of any one interested in the judgment, and hence the prescription pleaded is due exclusively to the negligence of the warrant-holders; that the city herself could not bring such a suit, as she could not be both plaintiff and defendant in the same suit; that she could not, as plaintiff, bring a suit against herself to revive a judgment against herself; your honors are respectfully asked to re-examine our argument on this point contained in our original briefs.

As to this plea, the court says in its opinion, that the act of sale created an express trust, under which the city undertook, as trustee, to collect and apply the drainage assessments to the payment of the price of the property sold to it; that this trust was a continuing and executory one, and that the universal rule in such cases is, that the statute of limitations is not set in motion until the trustee has repudiated his trust, and notice of his repudiation has been brought home to his *cestuis que trust*, and that such rule has been applied by the supreme court of Louisiana in Insurance Company *vs.* Pike,

32 An., 483. Reference is made in the opinion to the fact that the city alleges in its answer, that it has made repeated efforts,
572 by suits and otherwise, to collect the assessments, and thus confirmed the trust; it may be here observed that this averment was not made with reference to the assessments against the city herself, the impossibility of her collecting which, by suits against herself, will be readily recognized, and as to the account filed by defendant, which your honors say, shows the collection of assessments up to June 20th, 1891, only three years prior to the filing of the bill herein, an examination of it will show that it exhibits collections made from private parties above, so that whatever admission of her trusteeship may be involved in the averments of the answer mentioned, and the account is altogether foreign to the assessments against streets, etc., as to which the plea of prescription is made.

Your honors say, further, that it cannot be understood upon what authority, the city can claim a release from indebtedness by pleading its own neglect to revive the judgments, if such proceedings were necessary, and that such a pretension has neither the sanction of reason or authority; it is deemed proper to say here, that it is not the city's own neglect to revive which she pleads, but that of the warrant-holders; for the city herself to bring suits to revive judgments against herself will be at once recognized as a legal impossibility; the right to revive exists, under the article of the code cited, in favor of any one interested in the judgment, and the holders of the warrants were the only parties interested here; they were free to save the judgments from prescription by timely suits for their revival, which they neglected to do; we are confident that your honors will at once recognize that the city is not before you in the extraordinary position, as the opinion states, of pleading its own failure to save the judgments from prescription.

Proceeding, however, to lay before the court our views as to this point, if we have succeeded in establishing that the act of 1871 did not make the city a trustee of the judgments against herself, it only remains to consider whether that fact was accomplished by act No. 16, of 1876, or by the city's purchase under the authority of that statute; section 3 of the latter says that the price of the sale shall be paid in drainage warrants, which said warrants shall be issued in the same form and manner as those theretofore issued to the transferree of the canal company, under act No. 30, of 1871, for work done; that they should be payable out of the drainage assessments.

This statute leaves the judgments against the city precisely where they stood under the act of 1871, and unless the city became a trustee under that act, it was not made such by the statute of 1876, which does not undertake to specify by whom the drainage taxes were due; it does not in the slightest degree even intimate that any are owing by the city itself; on the contrary, its declaration that the warrants shall be paid out of the drainage assessments would imply that none were due by the city, because, if she owed anything, she would pay it out of her general funds, which could not

be described as assessments; if she were a debtor, and her indebtedness was designed to form any part of the fund out of which the warrants were to be discharged, it could not be described or
573 designated by the term assessments, which are charges levied against property or persons, natural or legal, to be collected by authority of law; both assessments and judgments against the city, if valid, could not, as matters stood when the act of 1876 was passed, between the latter and Van Norden, be assessments; they would be debts which the city owed to the warrant-holders, and if they were intended to furnish payment for the warrants, the act would have declared that to the extent of such indebtedness, the city should be liable on the warrants, and would not have fallen short of that meaning, by limiting the payment of the warrants to "drainage assessments."

We have argued on pages 31 to 33 of our reply brief that the act of sale from Van Norden and the canal company to the city, did not make the city a contractual trustee for the collection of the *judgments against herself*, and it is deemed unnecessary to repeat this argument here, but we respectfully ask that you will read it in the brief, the same as if set out here at length.

Regarding the statement of your honors' opinion that under Insurance Co. *vs.* Pike, 32 An., 403, that the trust created by the act of sale was continuing and executory, and under it the city undertook, as trustee, to collect and apply the drainage assessments to the payment of the warrants, it may be said that the authority of the Pike case, and the others cited, are not questioned, but they are altogether without application in the present instance; the city here does not plead prescription against her accountability as trustee of the drainage taxes due by private individuals; she claims that the judgments against herself have been extinguished by prescription; we have argued that as to these judgments she is not a trustee, but a debtor, and all debts are subject to the statute of limitation in this State; the Pike case touches no question bearing any resemblance to the one here at issue; Pike took possession of all the books, accounts, assets and property of the Southern Insurance Company, with the obligation to collect and account for the assets; an action for an account could never be prescribed, except from the date that he repudiated the trust; this is no authority against the position that judgments against the city, like judgments against any other person, are subject to the law of prescription.

The Succession of Farmer, 32 An., 1037, and McKnight *vs.* Calhoun, 30 An., 408, are cited by the court to show that the city cannot claim a release from its indebtedness to the drainage fund by pleading its own neglect to revive the judgments in proceedings to that end, when necessary; we have demonstrated, as we believe, the utter impossibility of the city bringing a suit against herself for the revival; on the other hand, the plain, positive, textual provisions of the code gave the warrant-holders the right to bring such suits themselves, in view of which it is deemed not disrespectful to say that your honors have fallen into the error of charging the city with neglect on account of her failure to do what she could not do,

and have given no effect whatever to the fact that the power to keep the judgment alive was at all times in the hands of the warrant-holders.

574 The Farmer and McKnight cases simply hold that the prescription of a debt is suspended as long as there exists between the creditor and debtor such relation as will prevent any suit for the debt; there was nothing here to prevent the drainage-warrant holders from having their judgment against the city executed, or to have saved them from prescription by bringing suits to revive; the dissimilarity between the cases cited and the cause here is conspicuous.

As to these judgments the city is not a trustee; the Pike case and those of like character have no reference to the prescription of debts or judgments dischargeable in money, but even if they did, and the city be considered to any extent in the fiduciary relation as regards the judgments, this would not deprive the city of the benefit of the prescription, not only under the articles of the code themselves, but their construction by the supreme court of Louisiana; it has been held by the Supreme Court of the United States that "no laws of the several States have been more steadfastly or more often recognized by this court from the beginning as rules of decision in the courts of the United States, than statutes of limitations of actions, real and personal, as enacted by the legislature of a State, and as construed by its highest court." Bauserman *vs.* Blount, 147 U. S., 647, 652, citing numerous authorities; also Beal *vs.* Oden, 163 U. S., 73.

Whether or not the assessments in question are subject to prescription at all, which the court says is more than doubtful, the decisions of the supreme court of Louisiana cited to show that they are not, it is respectfully suggested do not at all sustain the proposition; they were interpretations of special statutes, altogether different in character from the assessments here, they concerned general taxes, and not local assessments; we have been at pains to explain this at length on pages 36 and 37 of our reply brief, to which it is not deemed improper to ask your honors' attention; the case of Reed *vs.* his creditors, held that city taxes, levied under section 20 of the charter of 1870, were by its express terms imprescriptable; that State taxes, levied under the provisions of act 37, of 1871, and act 36, of 1869, found by the court to contain language of similar import to that contained in the city charter, were not subject to the laws of prescription; in both cases the taxes were held imprescriptable because the statutes under which they were levied said so; far from sustaining the positton that the drainage taxes were originally imprescriptable, they would rather tend to the contrary, because the law of 1858 contains no express exclusion of the law of prescription, while the statutes under consideration in the Reed case were held to save the taxes from prescription, because it was so said in terms.

Davidson *vs.* Lindop, 36 La. An., 765, is also an interpretation of section 20 of the city charter of 1870, containing a clause which made the taxes imprescriptable; the Jackson case, 34 An., 178, was

likewise a construction of special statutes, under which general taxes were levied, presenting no point of resemblance to the assessment acts under consideration here; we have argued in our
575 original brief, page 39, that under article 3547 of the Revised Civil Code, in ascertaining whether or not, the prescription which operates as a release from debt should be applied, the law regards simply the lapse of the requisite time; that in such a prescription, unlike that by which property is acquired, neither good faith or a just title is necessary; this would not, as seems to be supposed, involve the monstrosity of freeing an agent or trustee, to whom property has been confided for another, from the obligation of accounting for the same, after the lapse of a certain period from the inception of the agency or trusteeship; in such case the obligation of the trustee would not be to pay money, but to account for a trust; prescription, it is true, as to the accounting, would not begin to run until the trustee had placed himself in antagonism to his trust, by setting up a title inconsistent therewith, or repudiating the same; but here we have no such questions to deal with; the city pleads that she has been released from any debt founded on the drainage judgments against her by the lapse of ten years from their rendition; we are told that the city herself should have revived these judgments, but as has been shown hereinbefore, and the two briefs that this it was impossible for the city to do, had she so desired, for she could not sue herself, and occupy the position of both plaintiff and defendant in the same suit, while on the other hand, the warrant-holders were at full liberty, under the articles of the code, to have brought their own suits for revival.

We have cited in our original brief, pages 40 and 41, the case of Brown *vs.* Insurance Company, 3 An., 177, which shows that persons occupying the same position as that of the city in the present case, as regards the judgments against herself, were allowed the benefit of prescription; where the directors of a corporation, whose duty as directors it was to collect certain stock subscriptions made by themselves, were allowed the benefit of prescription as against a creditor seeking to make them liable on the subscriptions, after the corporation had become insolvent; they pleaded the prescription of ten years, to which it was replied that as directors of the company their duty was to collect all subscriptions; that while they were directors prescription was suspended; this was overruled, however, by the court; your honors are earnestly requested to examine this case; it is an authoritative interpretation by the highest court of Louisiana of the statute of limitations which is pleaded, and should control here.

With all earnestness and good faith that are possible, we respectfully ask your honors' attention to the fact that the plea of *res judicata* made by the answer, and supported by the evidence, is not noticed by the opinion, from which we respectfully suggest, it may be supposed that it must have escaped the attention of the court; it was fully discussed in the oral argument, and is fully explained on page 37 of defendant's original brief; that it is a complete defense to this suit is a proposition so obvious to defendant, that your

honors will surely take no offense at its surprise on discovering that your opinion passed it by without even mention; it is based upon the circumstance that James Jackson was an intervenor in the
576 Peake case on purchase warrants identical in character with those here sued upon; the character of these warrants, and the adverse decree concerning the same, is made conspicuous by the language found in the opinion of the court in the Peake case, 38 Fed. Rep., 782, in which the argument was made, that whatever might be said of the "work" warrants there involved that the purchase warrants stood upon a much stronger footing; the court passed upon the question, deciding that there was no difference between the two classes of warrants; this is referred to only to show, that whether the purchase warrants could be the basis of a recovery was a distinct and prominent issue in the Peake case, and received at least the deliberate consideration of the court; it was said in argument here, that *res judicata* could not prevail, because Warner, the complainant, was no party to the Peake case; this is simply misleading, and it is hardly necessary to cite authorities to this court to show, that what was adjudicated as to one purchase warrant was adjudicated as to the whole series, without any regard whatever to the party who holds them.

The twelfth and final ground on which the rehearing is applied for is, that your honors erred in holding that the city was without right to abandon the drainage work, and that she incurred any liability in consequence thereof; this matter was discussed in the oral argument, and on page 17 of our original brief.

There is very little to add, to that which has been said and written upon this point; as we have pointed out, if there be any difference in equity between "work" warrants and "purchase" warrants, as to the abandonment, the superior equity is in favor of the "work" warrants, and as to these, the Supreme Court, in Peake *vs.* New Orleans, 139 U. S., p. 360, held that the abandonment carried with it no resulting liability to their holders, aside from other considerations, when the monstrous character of the act of purchase is realized, this is made the more apparent; the facts are simply these Van Norden, for three hundred thousand dollars in drainage warrants, conveyed to the city a lot of dredge-boats and other drainage equipments, which had been in use by him at least four years, and presumably by the canal company, from whom he acquired them, for something over a year; the fervid description which the bill contains, of the amount of work performed by these boats and other instrumentalities authorizes us to suppose that they had been in constant use for five years; he had bought them from the company in 1872, as is shown by the conveyance, for fifty thousand dollars, and after having seen such service for four years, they had so far increased in value that he obtained from the city, as their price, six times the amount they had cost him by the argument of complainant; we are informed with great gravity, that besides the boats, the city acquired the rights, franchises and privileges of the canal company under the act of 1871; the shallowness of this pretense to eke out the consideration received by the city, is revealed by the slightest

examination of the facts; the rights, franchises and privileges of the company were nothing more than the right to dig canals and
build levees, and this, which is not an asset, but an obligation,
577 the city, taking the boats to be worth fifty thousand dollars, which Van Norden had paid for them, in turn paid two hundred and fifty thousand dollars for, her acquisition including the further right to pay out of her own pocket the cost of prosecuting the work of drainage.

The decree in this case will bear heavily against the defendant; your honors' highest mission and greatest care is to see that no injustice be done a litigant; the defendant solicits at your hands, what it confidently expects to obtain, and what your honors, it is believed, will not criticize its seeking a deliberate and mature consideration of the petition for a rehearing.

We trust that the court will find no fault with our earnest and respectful request, that the original and reply briefs already on file for defendant, will be taken as part of this statement, and receive the careful consideration of this court.

Respectfully submitted.

SAMUEL L. GILMORE,
City Attorney,
BRANCH K. MILLER,
Solicitors for Defendant and Appellee.

May, 1898.

(Endorsed:) Filed May 24, 1898. J. M. McKee, cl'k.

United States Circuit Court of Appeals, Fifth Circuit, November Term, 1897.

THURSDAY, *June* 2, 1898.

(Extract from the Minutes.)

JOHN G. WARNER
vs.
CITY OF NEW ORLEANS. } No. 691.

Ordered that the petition for rehearing filed in this cause be, and the same is hereby, denied.

Assignment of Errors.

United States Circuit Court of Appeals for the Fifth Circuit.

JOHN G. WARNER, Appellant,
vs.
CITY OF NEW ORLEANS, Appellee. } No. 691. In Equity.

Appeal from the United States circuit court, eastern district of Louisiana.

Assignment of errors.

And now comes the defendant and appellee, The City of New Orleans, and says that the decree of this honorable court herein, ren-

dered on May 17th, 1898, is erroneous and against the just
578 rights of the said city of New Orleans, and as such errors specifies and assigns the following, to wit:

First. That this honorable court, the United States circuit court of appeals for the fifth circut, is and was without jurisdiction to hear and determine this cause; that the case involves the construction and application of the Constitution of the United States, especially section 10 of article 1, and also the 14th amendment thereof, prohibiting all legislation impairing the obligation of contracts, as is shown by the averment of complainant contained in the twenty-fourth paragraph of his bill.

That, independent of the said averment, this case is one which involves the construction or application of the Constitution of the United States.

That in this case certain laws of statutes of the State of Louisiana are claimed to be in contravention of the Constitution of the United States, to wit, that by the said twenty-fourth paragraph of complainant's bill it is averred that the act of the General Assembly of the State of Louisiana No. 48 of the year 1877, excluding certain lands from all liability from drainage taxes and cancelling and annulling all judgments for the drainage of said lands, and the legal proceedings pending therefor, and the act of the General Assembly of the State of Louisiana No. 67 of the year 1877, declaring that no judgment for drainage taxes should be collected until the property had been benefitted to an extent equal to the drainage taxes imposed, and section 42 of act No. 20 of the General Assembly of the State of Louisiana for the year 1882, by which all laws providing for the drainage of the city of New Orleans or portions thereof and the collection of drainage tax assessments are unconstitutional, null, and void because repugnant to the Constitution of the United States, especially section 10 of article 1 and the 14th amendment of that Constitution, prohibiting all State legislation impairing the obligation of contracts and protecting the rights of property.

Second. That the court erred in holding that all of the defenses set up in the answer had been ruled upon adversely by the Supreme Court in the case of John G. Warner *v.* City of New Orleans, reported in 167 U. S., page 467.

Third. That the court erred in holding that the only fact in dispute between the parties is the question of responsibility for the alleged defects in the drainage plans; that the answer shows that there are other distinct issues made here which formed no part of the pleadings when the demurrer was heard, namely, the nonliability of the city for assessments against streets, public squares, and property of a like character; the effect of the amendment to the constitution of the State of Louisiana of 1874, and the plea of prescription and *res judicata*, that while the case of Peake *v.* City of New Orleans was pleaded in the demurrer as *res judicata* of the present case, the showing on the demurrer in this recpect was widely different from that made at present, namely, the record of the Peake case on the demurrer was not before the court, could only be sus-

579 tained by evidence, and hence the court should on the demurrer have no knowledge of its scope; in any event the part of the case of Peake relied upon to sustain the plea of *res judicata* was the intervention of James Jackson and the plea therein, which could by no process whatever be brought to the notice of the court on the demurrer, in consequence of which the overruling of the demurrer cannot be considered as overruling the plea of *res judiciata*.

Fourth. That the court erred in holding that the defects in the drainage plan were attributable to the fault of the city.

Fifth. That the court erred in holding that the city was trustee as to the so-called assessments and judgments therefor against streets, squares, and public property of a like character.

Sixth. That the court erred in holding that the city, by drawing warrants against the drainage fund, was estopped to deny the existence and validity of the said assessments against public property, and if the court intended to hold, independent of the estoppel it declares, that the said assessments on streets, public squares, and property of a like character were valid, or were made by any authority of law, or had any binding effect against the city, it also erred in this regard; and if it reached the conclusion that any validity or binding force was given to said assessments by the judgments of homologation set out in the bill, it also erred.

Seventh. That the court erred in finding that the cases of the New Orleans Drainage Co., 11 An., 338; Marquez *v.* City of New Orleans, 13 An., 319; Correjolles *v.* Succession of Foucher, 26 An., 362; Barber Asphalt Paving Co. *v.* Gogreve, 41 An., 259, were any authority on the question of the liability of public property to local assessment, or that the decision of those cases had any controlling or other influence on the issues involved here; likewise as to the case of McLean *v.* City of Bloomington, 106 Ill., 209.

Eighth. That the court erred in holding that the assessments on said public property constituted a lawful debt of the city, which must be discharged by the exercise of the power of taxation.

Ninth. That the court erred in holding that the constitutional amendment of 1874 was not a complete defense to this suit; that while the said amendment permitted the issue of drainage warrants, the same, by the express terms of the amendment as to their payment, were restricted to drainage taxes alone, the same amendment allowing this mode of payment, "and not otherwise." This was an express denial of any power in the city, by any process whatever, to become the absolute debtor of the said warrants; and in any event the proviso of the amendment as regards the drainage warrants extended no further than to those issued under act No. 30 of 1871, and by no interpretation could be held to include warrants issued under the subsequent act No. 16 of 1876; that the said assessments against public property were not confirmed by act No. 30 of 1871, such confirmation as may have been given by said act having reference exclusively to assessments against private property; that the authority to draw drainage warrants allowed by the amendment does not imply, as is declared by the court, an affirmance either of the valid-

ity of the assessments against streets and other public prop-
580 erty or of the right of the city to proceed to the completion of drainage work then in progress, the said work at the time of the adoption of the amendment being exclusively in the hands of Van Norden, transferee of the Mississippi & Mexican Gulf Ship Canal Company, to the doing of which the city had no relation whatever, and to which it was a perfect stranger until its purchase under the act of 1876, some two years and a half after the amendment was adopted; that the city was absolutely without power to increase her debt by the purchase of 1876, or by any of the consequences thereof, and the effect of the constitutional prohibition could not be avoided by an error of law or otherwise.

Tenth. That the court erred in overruling or refusing to maintain the plea of prescription as to the assessments against public property and the judgments homologating the same; that as to these the city was not a trustee, but at most, under complainant's contention, a mere debtor, and even this is distinctly denied by defendant; that whether or not the said assessments and judgments are prescribed is to be determined by the law of prescription in the State of Louisiana; that the statutes of limitations of the several States and the interpretation given them by the highest court of the State in question are binding as rules of decision in the Federal courts; that the laws of prescription of the State of Louisiana and their construction given by the supreme court of this State, so far as they operate as a release from debt, depend for their application solely upon the lapse of time required; that good faith or bad faith, trusteeship, or other like matters are not considered. The mere passing of the time of the statute without further condition constitutes a complete defense; hence, even if the city, as erroneously held by your honors, was a trustee the plea of prescription as against the said assessments against public property and the judgments therefor should have been maintained; that the case of Insurance Company *v.* Pike, 32 An., 483, is wholly inapplicable to this case, as concerns the said assessments against public property and the judgments therefor; that the city has not averred in its answer that it has constantly endeavored by suits and otherwise to collect these assessments, but on the contrary, the answer expressly denies that they had or ever had any validity or binding force; that the averments of the collection and accounting for taxes set up in the answer are limited in terms to the assessments against private property; therefore the conclusion of the court that the city by its efforts to collect has affirmed the trust as to the assessments against herself is error; that the city does not plead her own neglect to have kept the judgments against herself alive by bringing suits for their revival; that as a matter of fact she could not have done so, it being in law inconceivable that she as a plaintiff could bring a suit against herself as a defendant to revive a judgment against herself; that this would not leave complainant without remedy, as by article 3547 of the Revised Civil Code any person interested in a judgment may bring a suit for its revival, so that it is the warrant-holders and not the city who have allowed the said judgments to

prescribe. The city was absolutely without power to revive
581 them, while the warrant holders were free to have done so.

In consequence of this and other considerations the cases of the Succession of Farmer, 32 An., 1037; McKnight *vs.* Calhoun, 36 An., 408, to the effect that the prescription of debts due by a succession to its administrator and *vice versa* is suspended while the obligation continues, are without application here; that whether or not the assessments as originally made are subject to prescription, and defendant insists that they are, they have, by the averment of complainant, passed into judgments, and by merger have lost their original character; and that the judgments are subject to prescription is apparent from the textual provisions of article 3547, Revised Civil Code, the case of Reed *v.* His Creditors, 39 An., 115, citing State *v.* Jackson, 34 An., 178, and Davidson *v.* Lindop, 36 An., 767, construing, as they do, the particular provisions of special statutes presenting no feature in common with those presented here, the statutes interpreted by those cases, different from those involved here, expressly provide that the taxes levied thereunder shall not be subject to prescription and furnish no authority upon the question of prescription here at issue.

Eleventh. That the court erred in holding that the only remaining consideration which required its consideration after having disposed of those preceeding was that of prescription; that defendant, besides the other defenses, had pleaded *res adjudicata*, based upon the opinion and decrees of the United States Supreme Court and of the circuit court for the fifth circuit and eastern district of Louisiana in the case of James W. Peake *vs.* City of New Orleans, #11614 of the docket of the latter. The opinion of the Supreme Court in such cause is found in 139 U. S. Reports, page 323. (See Record, page 22 and 23.) The opinion of the court did not dispose of this defense; it was not considered. It should have been maintained as a bar and defense to this suit.

Twelfth. That the court erred in holding that the city should not be allowed, in any event, the amount of its bond issue described in the answer as a credit in her favor on any amount which she might hereafter be decreed to owe; that while it has been held by the Supreme Court that the bond issue could not be so treated, the opinion of the Supreme Court was based upon the question submitted for its consideration in this respect, which was made up from the record of the case as it then stood, namely, on an answer and a demurrer; the record at that time necessarily did not and could not make the showing of facts that is now before the court, namely, that Van Norden, the vendor of the city, received, either himself personally or through his employees, assignees, or transferrees, the entire issue of bonds, and hence could not plead ignorance of the fact that the drainage fund had been augmented to the extent of the issue of bonds; that this would remove the element of ignorance on his part necessary to constitute an estoppel as against the city; that while the finding of the Supreme Court that the bond issue could not be treated as a defense was on the demurrer, it does not extend to the exclusion of such defense under the evidence now disclosed by the

record; the bill does not even aver that Van Norden was ig-
582 norant of the issue of bonds, but that he did not understand that its legal consequence was a diminution of the outstanding drainage fund, and that he did not anticipate at the time of the purchase that the city would make such claim. This, at most, would be an error of law, a lack of correct judgment as to the legal consequences of a certain act, against which the law of Louisiana does not relieve.

It should be noted also that what the Supreme Court said was based only upon the status of the bond issue, as shown by your honors' certificate, and not by the averments of the bill, the former being much narrower than the latter.

Thirteenth. That in Peake *v.* New Orleans, 139 U. S., 342, the Supreme Court held that the city had the right to abandon the work of drainage—that such an abandonment was no cause of liability to warrant-holders; that while that opinion was with reference to work or construction warrants, it is equally to the purchase warrants sued on herein, and that the city should be exonerated from any liability based on the ground of the abandonment of said work, and in failing to give effect to this ground of the defence the court erred.

Fourteenth. That the court erred in holding that the city of New Orleans was a debtor of John G. Warner, the complainant, in the sum of six thousand dollars, with eight per cent. interest from January 6th, 1876, or in any sum whatever.

Fifteenth. That the court erred in decreeing that the drainage assessments, including those against the defendant as assessee of streets, squares, and public places, as well as those against the owners of private property, constituted a trust fund in the hands of the city for the purpose of paying the claims of complainant and other holders of the same class of warrants issued under the act of sale from Warner Van Norden, transferree, to said city, under the authority of act 16 of the legislature of the State of Louisiana, approved February 24th, 1876.

Sixteenth. That the court erred in holding that the city in any mode should be held to account for assessments of drainage taxes against streets, public squares, public places, or other property of a like character; that the court erred in decreeing that no offset should be allowed the city in any event for bonds issued in exchange for drainage warrants under the act of 1872.

Seventeenth. That the court erred in decreeing that complainant and those who had established their claims under the fourth clause of the decree would be entitled to an absolute decree against the defendant under any conditions.

Eighteenth. That the court erred in failing to given due effect to the appointment of a receiver for drainage taxes. This suit if otherwise well founded, which is denied, should be directed against said receiver, and not against the defendant.

Nineteenth. That the court erred in not holding that the acts of the General Assembly of the State of Louisiana Nos. 48 and 67 of 1877 and section 40 of act No. 20 of 1882 were full and complete

authority and justification of the city of New Orleans for having abandoned the work of drainage, and also a full defense to
583 the liability asserted in this suit against her for any non-collection of drainage taxes.

Wherefore, for the errors assigned and for others manifest in the record, said defendant and appellee prays that said decree of the said United States circuit court of appeals for the fifth circuit be reversed and the case remanded to the same, or to the United States circuit court for the fifth circuit and eastern district of Louisiana, as may be in accordance with law, with directions to proceed according to law.

SAM'L L. GILMORE,
City Attorney.
BRANCH K. MILLER,
Solicitor for City of New Orleans, Defendant and Appellee.

(Endorsed:) Filed June 6, 1898. J. M. McKee, clerk.

United States Circuit Court of Appeals for the Fifth Circuit. In Equity.

JOHN G. WARNER, Appellant,
vs.
CITY OF NEW ORLEANS, Appellee. } No. 691.

Appealed from the United States circuit court, eastern district of Louisiana.

To the honorable the judges of the Supreme Court of the United States:

The petition of The City of New Orleans, a municipal corporation created by the laws of the State of Louisiana, defendant and appellee in the above-named cause, respectfully shows:

That it is advised and believes that there are manifest errors to its prejudice, as specified in the assignment of errors filed herewith, in the final decree of this honorable court made herein May 17, 1898.

That the matter in controversy herein exceeds one thousand dollars besides costs.

That this case involves the construction or application of the Constitution of the United States, to wit, section 10 of article 1, and the 14th amendment thereof, as appears by paragraph twenty-four of the complainant's bill.

That in this case certain laws of the State of Louisiana are claimed to be in contravention of the Constitution of the United States, to wit, that acts Nos. 48 of 1877 and 67 of 1877 and section 42 of act No. 20 of 1882 are charged by complainant's bill to be in contravention of section 10 of article 1 and the 14th amendment of the Constitution of the United States, as also appears by paragraph twenty-four of complainant's bill.

That petitioner is entitled to an appeal from said final decree to the Supreme Court of the United States for the correction of the

said errors therein, set out in detail in the said assignment
584 of errors; that petitioner desires the said appeal to operate as a supersedeas or stay of execution of the said final judgment or decree.

Wherefore petitioner prays that it be granted an appeal from the said final judgment or decree, with supersedeas, returnable to the Supreme Court of the United States within thirty days from the signing of the citation herein, on its furnishing bond, conditioned according to law, in the sum of — dollars, and that citation in accordance with law issue to the said John G. Warner.

SAM'L L. GILMORE,
City Attorney.
BRANCH K. MILLER,
Solicitor for City of New Orleans,
Defendant and Appellee.

Order Allowing Appeal.

The prayer of the above petition is granted, to operate as a supersedeas on giving bond in the sum of $1,000.00.

Washington, D. C., June 8th, 1898.

JOSEPH McKENNA,
Associate Justice of the Supreme Court of the United States.

(Endorsed:) Order allowing appeal. Filed June 10, 1898. J. M. McKee, clerk.

Appeal Bond.

Know all men by these presents that we, the City of New Orleans, as principal, and Robert M. Walmsley, of the city of New Orleans, State of Louisiana, as surety, are held and firmly bound unto John G. Warner in the full and just sum of one thousand dollars, to be paid to the said John G. Warner, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 6th day of June, in the year of our Lord one thousand eight hundred and ninety-eight.

Whereas lately, at a United States circuit court of appeals for the fifth circuit, in a suit depending in said court between John G. Warner, complainant and appellant, and The City of New Orleans, defendant and appellee, a final decree was rendered against the said City of New Orleans, and the said City of New Orleans having obtained an appeal, with supersedeas, and filed a copy thereof in the clerk's office of the said court to reverse the final decree in the aforesaid suit, and a citation directed to the said John G. Warner, citing and admonishing him to be and appear before the Supreme Court of the United States, to be holden at Washington, District of Columbia, within thirty days from the date thereof:

Now, the condition of the above obligation is such that if the said

City of New Orleans shall prosecute its said appeal to effect
585 and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

CITY OF NEW ORLEANS,
By W. C. FLOWER, *Mayor.*
R. M. WALMSLEY.

Sealed and delivered in the presence of—
A. BRITTIN.
SAM'L L. GILMORE.

STATE OF LOUISIANA, }
Parish of Orleans. }

Personally appeared Robert M. Walmsley, who, being duly sworn, deposes and says that he is a citizen of the State of Louisiana and a resident of the city of New Orleans, in said State; that after the payment of all of his debts and the discharge of all of his obligations he has property liable to execution of the value of more than one thousand dollars; that said property consists of real estate situated in the city of New Orleans, bonds, stocks, and other property of a like character.

R. M. WALMSLEY.

Subscribed and sworn to before me this 6th day of June, A. D. 1898.

FRANK H. MORTIMER,
U. S. Commissioner.

The above and foregoing bond is hereby approved, to operate as a supersedeas.

JOSEPH McKENNA,
Associate Justice Supreme Court of the United States.

Washington, D. C., June 8, 1898.

(Endorsed:) Bond of appeal. Filed June 10, 1898. J. M. McKee, clerk.

Opinion.

United States Circuit Court of Appeals, Fifth Circuit, November Term, 1897.

JOHN G. WARNER, Appellant,
vs.
CITY OF NEW ORLEANS, Appellee. } No. 691.

Appeal from the circuit court of the United States for the eastern — of Louisiana.

Before Pardee and McCormick, circuit judges, and Swayne, district judge.

The legislature of the State of Louisiana, by act approved March 18th, 1858, established a system of drainage of certain portions

586 of the parishes of Orleans and Jefferson, which was to be carried on by boards of commissioners appointed for the three drainage districts into which the territory was divided.

The commissioners were required to prepare plans of the proposed work, giving the names of the proprietors of the lands to be drained, which were to be filed in the mortgage office. The act further provided that notice of the filing of the plans should be given by publication, and that upon the application of the commissioners to the courts specified in the act judgments should be entered decreeing the lands subject to a first-mortgage lien and privilege for such amount as might be assessed for drainage purposes.

By a supplemental act, approved March 17th, 1859, the commissioners were authorized to borrow money to carry on the work. By another act, approved March 1st, 1861, the prior acts were amended for the purpose of providing a mode of enforcing assessments when made, and for that purpose authorizing the commissioners to apply to certain courts for the approval and homologation of the assessment-rolls, which approval and homologation, the act declared, "shall be a judgment against the property assessed and the owners thereof, on which execution may issue as on judgments rendered in the ordinary mode of proceeding."

The commissioners made plans of the work proposed to be done, including therein the streets, squares, and public places within the several districts, as the property of the city of New Orleans, and from time to time judgments were rendered charging these public places, as well as private property, with the amounts that might be assessed for drainage purposes. Subsequently assessments were made in some districts by the commissioners and in others by the board of administrators of the city of New Orleans, which succeeded them under the act of 1871, and judgments were rendered for the amounts assessed against the lands and the owners pursuant to the act of 1861. These assessments in every instance included the streets, squares, and public places, and the city of New Orleans as the proprietor thereof.

In 1871 the legislature by act 30 of that year abolished the several boards of drainage commissioners, transferring all the assets and everything appertaining to the drainage districts to the board of administrators of the city of New Orleans, which was subrogated to all the rights and powers and facilities then possessed by the commissioners, and that the board was dirrected to collect the balance due on the assessments, as shown by the books of the first, second, and third drainage districts, "which said assessments are hereby confirmed and made exigible at such time and in such manner as the board of administrators may designate." The act further authorized the board of administrators to make other assessments, and required it to place all collections of drainage assessments to the credit of the Mississippi & Mexican Gulf Ship Canal Co., said company being the corporation charged under the act with the drainage work, and hold the same as a fund to be applied to drainage purposes. Under these several acts assessments were made

587 against the city on the area of the streets and other public places within the drainage districts and reduced to judgment to the amount of $696,349.30, and against private persons to the amount of $1,003,342.28, of which about $330,000 has been collected from private property in cash and drainage warrants, leaving outstanding at the date of the filing of the bill in this case uncollected assessments to the amount of $1,469,714.47, of which the city owes $696,349.30. The canal company carried on the work until 1872, when it transferred its franchise, drainage-boats, and machinery to Warner Van Norden, who thereafter continued the work, receiving warrants against the drainage fund in payment of the amount earned.

In 1876, after more than two-thirds of the drainage system had been completed, the legislature, by act No. 16 of that year, authorized the city of New Orleans to acquire, if the council deemed it advisable, the property and franchise of the canal company, or its transferee, at a valuation to be fixed by appraisers to be appointed by itself, the price to be paid in warrants drawn against the drainage assessments. The same act granted the city the right and power thereafter to do all necessary drainage work in case it should make the purchase. The city availed itself of this authority, and on the sixth day of June, 1876, made the purchase at an appraised value of $300,000, and issued drainage warrants to that amount to Van Norden for the price, covenanting in the act of sale not to obstruct or impede, but, on the contrary, to facilitate by all lawful means, the collection and application of the drainage assessments to the payment of the purchase warrants.

On this state of facts the complainant, as holder of $6,000 of these warrants, brings this suit. The bill, after reciting these facts, avers in substance that upon acquiring the drainage plant and franchises of the canal company the city abandoned all drainage work and suffered the dredge-boats and machinery purchased, as above stated, to decay and become valueless, and that by reason of the city's failure to complete the drainage and benefit the lands the courts have refused to enforce the collection of the assessments; that, having thus abandoned all drainage work, the city, by its ordinances and by a proclamation of the mayor, then advised property-holders not to pay the assessments, and that in consequence of these ordinances and said proclamation and the decisions of the courts the drainage assessments became practically valueless and uncollectible. The bill further avers that the city had issued bonds in exchange for drainage warrants given for work prior to the sale, under the authority of the act of the legislature of 1872, to an amount in excess of all the drainage assessments, which it will claim operated as a discharge of its liabilily, as assessee of the streets, etc., and of all liability it may have incurred by any dereliction of duty in regard to the assessments against private property, but that this claim was not made known to Van Norden at the time of the purchase, and that he would not have parted with his property payable out of drainage assessments if he had known that such claim would be set

588 up to defeat the payment of the price. The bill closes with a prayer for an accounting of the drainage fund, including the amounts due by the city and the application thereof to the payment of the complainant's warrants and those held by others similarly situated who may come in and avail themselves of the benefits of the bill.

To this bill the defendant filed a demurrer, both general and special, assigning for cause, 1st, want of jurisdiction in the circuit court; 2nd, want of equity in the bill, and, 3rd, that the matters sought to be litigated had been decided adversely to the complainant's pretentions in the case of J. W. Peake *v.* City of New Orleans, 139 U. S., 342. The demurrer was sustained and the bill dismissed by the circuit court, and the cause was removed here on the appeal of the complainant. This court being in doubt as to the application of the decision in Peake *v.* New Orleans, *supra*, to the case made by the bill certified the following questions to the Supreme Court for advice and instructions:

"First. Is the city of New Orleans, under the warranties, express and implied, contained in the contract of sale of June 7, 1876, by which she acquired the property and franchise from Warner Van Norden and under the averments of the bill, estopped from pleading against the complainant the issuance of bonds to retire $1,672,105.21 of drainage warrants, issued prior to said sale, as a discharge of her obligation to account for drainage funds collected on private property and as a discharge of her own liability to that fund as assessee of the streets and squares?"

"Second. Should the decision in the case of Peake *v.* New Orleans, 139 U. S., 342, be held to apply to the facts of this case and operate to defeat the complainant's action?"

The court declined to answer the second question on the ground that it practically submitted the whole case, but answering the first, after reciting the facts, said:

"And now the question is whether the city is not estopped to plead in defence of liability on these drainage warrants the fact of prior issue of bonds to a larger amount than that assessed against the areas of its streets and squares and collected from private property. We think this question must be answered in the affirmative. The city, in respect to the purchase of this property from the canal company and its transferree and in the obligations assumed by the warrants issued, acted voluntarily. It was not in reference to these matters as it was to those considered in Peake *v.* New Orleans, 139 U. S., 342, a compulsory trustee, but a voluntary contractor, and the proposition which we affirm is that one who purchases property, contracting to pay for it out of a particular fund, and issues warrants therefor payable out of that fund, a fund yet partially to be created and created by the performance by him of a statutory duty, cannot deliberately abandon that duty, take active steps to prevent the further creation of the fund, and then, there being nothing in the fund, plead in defence to a liability on the warrants drawn on that fund that it had prior to the purchase paid off obli-

589 gations theretofore created against the fund. Whatever equity may do in setting off warrants drawn before this purchase from the canal company and its transferree, the bonds issued by the city (and in respect to that matter, we can only refer to Peake *v.* New Orleans, *supra*), it by no means follows that the city can draw new warrants on the fund in payment for property which it voluntarily purchases and then abandon the work by which alone the fund could be made good, resort to means within its power to prevent any payments of assessments into that fund, and thus, after violating its contract promise not to obstruct or impede, but, on the contrary, facilitate by all lawful means, the collection of the assessments, plead its prior issue of bonds as a reason for evading any liability upon the warrants. One who purchases property and pays for it in warrants drawn upon a particular fund, the creation of which depends largely on his own action, is under an implied obligation to do whatever is reasonable and fair to make that fund good. He cannot certainly so act as to prevent the fund being made good and then say to his vendor, You must look to the fund and not to me. We are clear in the opinion, therefore, that the first question must be answered in the affirmative."

Being thus advised and being satisfied that the complainant was entitled to the relief prayed, this court itself answered the second question in the negative, reversed the decree appealed from, and directed the circuit court to overrule the demurrer. (See John G. Warner *v.* City of New Orleans, 81 Fed. Rep., 645.)

The city subsequently filed an answer at great length, admitting that judgments were rendered against it, as alleged in the bill for the amount assessed against the streets, squares, and public places, but alleged that the assessments first levied by the commissioners and afterwards extended by the board of administrators to the city were null and void because levied on public property exempt from taxation, and that the judgments against the city therefor were for the same reasons also void. The answer further alleges that the city has performed its full duty in relation to the collection of assessments against private property, but admits that the proclamation referred to in the bill advising property-owners not to pay drainage assessments was issued by the mayor under authority of an ordinance of the city. It further alleges that the drainage plans made by the canal company were so defective that their completion would have been of no benefit to the property attempted to be drained; that the — done under them was also defective and of no value, and that for these reasons the city was justified in suspending the further prosecution of the work, which resulted in the decision of the Supreme Court in the case of Davidson *v.* The City of New Orleans, 34 Ann., 170, declaring judgments for drainage assessments void for failure of consideration, and that this decision has become the settled rule of law in the State, rendering further collections impossible; but that, notwithstanding this decision, the city has constantly and at all times endeavored in every way possible to realize the assessments, and the city files an account showing the collections made in 1871 to June 20th, 1891, inclusive, and

the disposition thereof, as a sufficient compliance with its duty as a trustee. In conclusion, the city pleads the appointment of a
590 receiver for the drainage fund by the circuit court and the prescription of five and ten years in bar of the bill, and the issuance of the bonds under the act of 1872 as a discharge from all liability, and the decision in Peake *v.* New Orleans as *res adjudicata* on all the issues in the case.

SWAYNE, district judge, delivered the opinion of the court:

As to nearly all of these defences we might well rest our decision in this case on the opinion of the Supreme Court expressed in answer to the certified question. All the facts averred in the bill have either been admitted by the answer or abundantly established by evidence. Indeed, the only fact in dispute between the parties is the question of responsibility for the alleged defects in the drainage plan. So far, however, as the answer attempts to fasten this responsibility on the canal company and Van Norden, its transferree, as a defence to this action, it is entirely unsupported by the evidence, as the counsel for the city very frankly admitted in their argument at the hearing. The general plan under which the work was undertaken by the contractor was prescribed by the legislature in the act of 1871, which directed the canal company to dig canals above, below, and in the rear of the city, and with the earth removed therefrom to build levees to protect the city from overflow, and to dig such interior canals as might be necessary for the drainage of the city and the lands in the rear; but the right to prescribe the location and number of all the canals was expressly vested in the city. As a matter of fact, the city, through its ordinances, based on the recommendation of the city engineer, located each of the canals that were excavated and exercised direct supervision over the work, which the assistant engineer having charge of the work says was done strictly in accordance with the specifications furnished by the contractor, and well done.

The principal objections made to the plan by some of the eminent engineers who have testified are that it was not sufficiently extensive to meet the future requirements of a growing city like New Orleans; that it did not provide the number of interior canals necessary to hold and carry off the excessive rainfall, and that the method of discharging the drainage water by means of pumps into the lake was too expensive and was wrong from a sanitary point of view. Testifying by the light of experience and investigation made by them since 1871, they give it as their opinion that a greater number of canals should be excavated than called for by the plan, and that the drainage ought to be discharged into Bayou Bienvenue, some distance below the city proper, through a main canal, by means of a series of pumping stations. Other engineers of equal reputation, notably Mr. Bell, who, as engineer of the city in 1871, devised the plan now condemned, and the present city engineer and others, testify that the plan was a good one, and, if carried out, would have accomplished the drainage of the city.

The cost of completing the work after the city purchased the

drainage plant, as testified to by some of the witnesses for the defendant, would have been about $500,000 if paid for in cash
591 and not in warrants; but it now appears that a new plan of drainage has recently been adopted which, incorporating and using all the old works, is estimated to cost about $8,000,000.

Without commenting further on the evidence on this part of the defence, our conclusion is that the plan under which the work was done by the canal company and its transferree would, if carried out as contemplated, have sufficiently accomplished the drainage of the lands within the several districts to render the assessments available if the city had kept the work in serviceable condition after its completion, as the law required. It is a singular fact that, while the answer in this case charges the failure of the drainage to the alleged defective plan and the work of the contractor, the principal ground of the decision in Davidson *v.* New Orleans, 34 Ann., 170, for annul-ing the judgment for one of these assessments is that the city had abandoned the work without any probability of renewing it, so that the work in its incomplete state was a detriment rather than a benefit to the lands. The failure of consideration which worked the distruction of the drainage fund was therefore, as adjudged by the supreme court of the State, caused directly by the fault of the city. Its conduct in this and other respects was a violation of its duty as trustee and was a breach of the covenant contained in the act of purchase, "not to obstruct or impede, but, on the contrary, to facilitate by all lawful means, the collection of the drainage assessments." Treating the city, therefore, as a trustee, under an express duty to do whatever was reasonably required to make the drainage fund available for the purpose of paying the purchase warrants, a court of equity will apply the maxim "that equity looks upon that as done which ought to have been done." The true meaning of this maxim is that equity will treat the subject-matter, as to all collateral consequences and incidents, in the same manner as if the acts contemplated by the parties had been executed exactly as they ought to have been. * * * They are also deemed to have the same consequence attached to them, so that one party or his privies shall not derive benefit by his laches or neglect and the other party for whose profit the contract was designed shall not suffer thereby."

1 Story Eq. Jur., sec. 64*g*.

The city must therefore be treated as having done whatever was necessary to render the assessments available, and should be held to account for the drainage fund as if collected and in hand.

It is claimed, however, that the city is not bound to account for the assessments and judgments against itself, as the quasi owner of the streets and other public places, on the ground that such assessments and judgments should be considered void *ab initio*, for the reason that public property is exempt from taxation; but we think the city, by drawing these warrants against the drainage fund, composed largely of these very assessments and judgments, is, under the principals laid down by the Supreme Court in the present case,

estopped to deny their existence and validity to the same ex-
592 tent that it is estopped from setting up the issue of bonds under the act of 1872 as a discharge of its general liability as trustee with reference to the fund. As an original question, however, the authorities seem to affirm the liability of a municipal corporation for its proportion of the cost of local improvements independently of the existence of any estoppel.

In New Orleans Drainage Co., II Ann., 338, the supreme court of Louisiana held the city of New Orleans liable for assessments made on the area of the streets under the act of 1835, which is similar in all respects to the acts involved here, except that the assessments in that case had not been ratified by the legislature, as was done in this instance by the act of 1871. This case has since been commented upon and affirmed in Marqueze *v.* New Orleans, 13 Ann., 319; Corejelles *v.* Succession of Foucher, 26 Ann., 362, and in Asphalt Paving Co. *v.* Gogreve, 41 Ann., 259, and the matter of local assessments has been the subject of judicial inquiry in other States, notably by the supreme court of Illinois in the case of The County of McLean *v.* City of Bloomington, 106 Ill., 209, where all the objections raised in this case have been elaborately considered and decided in harmony with the case above quoted. Says the court in that case:

"The objections may be included under three heads: First, that public property is exempt from special assessments; second, that the statute under which the State is proceeding does not authorize any assessments against the property of the county; third, that the judgment cannot be enforced by the sale of the property, and no other mode of enforcing payment of such judgments can be resorted to."

"It is not claimed the first objection has the direct sanction of statutes in its support, but the contention is that such property is expressly exempt from taxes, and special assessments are included in the word taxation. We have been too long and too firmly committed to the doctrine that exemption from taxation does not except from special assessments to now admit that it is even debatable; * * * the distinction between taxes and special assessments is clearly made in our present constitution, and while providing that the General Assembly may exempt the property of the State, counties, and municipal corporations from the former, makes no provision in regard to the latter, but, on the contrary, * * * authorized the General Assembly to vest the corporate authorities of cities, towns, and villages with power to make local improvements by special assessments, without any restriction as to the property to be assessed."

"The second objection rests entirely on the assumption that to include the property of counties it should be expressly named, and that language, however comprehensive in general terms only, is not sufficient. The rule held by this court is directly the reverse of this assumption. The exemption, and not the inclusion, must specially appear. * * * The question relates solely to the right of the State to apportion the public burden upon public property in

common with private property in proportion to the benefit conferred upon that property."

593 "The remaining question, we think, involves no serious difficulty, although at first blush it may seem to do so. We certainly do not hold the court-house square may be sold and title passed to private parties or to the city. In Taylor *v.* People, 66 Ill., 322, we held that in such cases the amount should be paid out of the treasury."

The distinction here made between taxes and local assessments has been fully recognized by the supreme court of Louisiana in Charnock *v.* Levee Co., 38 Ann., 326, and in Barber Asphalt Co. *v.* Gogreve, 41 Ann., 263, where the drainage case in II Ann., 372, is cited with approval.

Whether the obligation for these drainage assessments had its origin in the original acts of 1858, 1859, and 1861 or was cast upon the city by the act of 1871, confirming the assessment-rolls upon which the city was named as a debtor, or results from judgments based on these rolls, the amount of the assessments constitute a lawful debt of the city which must be discharged by the exercise of the power of taxation, such power being the usual and, in most instances, the only method by which municipal corporations can discharge their indebtedness.

U. S. *v.* New Orleans, 98 U. S., 381.

Wolff *v.* New Orleans, 103 U. S., 358.

It is urged, however, that the contracts of purchase made in 1876 are null and void because it operated to increase the debt of the city in violation of the amendment of the constitution of the State adopted in 1874. This assumption is based on the theory that assessments against the city were at that time void, and that to now enforce them would increase the city debt. It is said, also, that the city was not at that time the primary debtor for assessments against private property, and that if the court should now impose a liability on the city for the dereliction of duty charged in the bill it would create a new debt which will come within the prohibition. We cannot concede the correctness of this argument. It is true the amendment prohibited any increase of the city debt after January 1st, 1875, but it also expressly provided that it should not prevent the issue of drainage warrants to the transferree of the contract under the act 30 of 1871, payable out of the drainage taxes; but it seems clear to us that by express terms the amendment excludes and intended to exclude from its operation the liability of the city growing out of its relation to drainage matters, including the city's liability as assessee of the streets and public places, as shown by the assessment-rolls. Indeed, it would seem that the authority to issue warrants against the drainage fund after that date necessarily implied an affirmance of the right of the city to proceed to the completion of the drainage work then in progress, and impose a corresponding duty on the city to collect and apply all the drainage assessments to the payment of the warrants. These taxes being them liabilities of the city cannot by any cause of reason be included

in the clause prohibiting an increase of the debt of the corporation without imputing to the authors of the constitution an intent
594 to defraud those who might deal with it under the invitation of the constitution.

We cannot give to the organic law of the State a construction so repugnant to honesty and good morals, nor do we believe the legislature in authorizing the city to purchase the property of the transferree of the canal company, nor the city in making the purchase for the purpose of carrying on and completing the drainage, contemplated defrauding the vendor by invoking any such inequitable construction.

Even admitting that the purchase created a debt in excess of the limitation, the most that can be said is that it was made in error of law, which, according to article 1846 of the Civil Code of Louisiana, cannot be alleged to acquire the property of another. This principal is embedded in the civil law, as shown by the learned disquisition of D'Aguesseau, to be found in the second volume of Pothier on Obligations, page 350. The same principal is recognized by the Supreme Court in Railway Co. *v.* McCarthy, 96 U. S., 420, in which the court says that a corporation, having enjoyed the fruits of a contract fairly made, cannot, when called to account, deny the corporate power to make it.

The only remaining question which requires consideration is the plea of prescription, and that, we think, cannot be maintained. The act of sale created an express trust, in which the city undertook, as a trustee, to collect and apply the drainage assessments to the payment of the warrants given for the price of the property sold to it. This trust was a continueing and executory one, and the universal rule in such cases is that the statute of limitations is not set in motion until the trustee has disavowed the trust and notice of his repudiation has been brought home to the *cestui que trust.*

Perry on Trusts, sec. 24.

Lewis *v.* Hawkins, 23 Wall., 119.

This rule has been expressly recognized and applied by the supreme court of Louisiana in Insurance Co. *v.* Pike, 32 Ann., 483, where it is held that prescription against the right to demand an accounting begins to run only from the date of the last act performed by the trustee with reference to the trust. In that case the act which was held to be a recognition of the trust consisted of a credit entry for money collected, made by the defendant in the books of the insurance company of which he was treasurer.

In the present case the city alleges in its answer that it has constantly endeavored by suits and otherwise to collect the drainage assessments, thus affirming the trust, and has filed an account showing the collections of assessments up to June 20, 1891, only three years prior to the date the bill was filed.

Notwithstanding these facts, it is still insisted that the judgments against the city are prescribed under the laws of the State, because they have not been revived within ten years since their rendition, even if the city has continued to act as trustee up to the time of

filing the bill. We cannot understand upon what theory the
595 city can claim a release from its indebtedness to the drainage fund by pleading its own neglect to revive the judgments, if the proceedings to revive were necessary to keep them in force. Such a pretention has neither the sanction of reason or authority. On the contrary, the maxim *contra non valentem* is universally applied as between a trustee and an estate represented by him, and so in this State it has been held that neither a claim of an administrator against the estate he represents nor the claims of the estate against him are subject to prescription as long as he remains a trustee.

Succession of Farmer, 32 Ann., 1037.
McKnight *v.* Calhoun, 36 Ann., 408.

The reason given by the court for the application of the maxim in these cases is that an administrator, from the very nature of things, cannot sue himself if a debtor to the estate, nor sue the estate, of which he is the sole representative, if he is a creditor.

Moreover, it is doubtful whether statutory assessments of the character in question are subject to any prescription at all. Indeed, the supreme court of the State has held, in Reed *v.* His Creditors, 39 Ann., 115, citing State *v.* Jackson, 34 Ann., 178, and Davidson *v.* Lindop, 36 Ann., 767, that, tax laws being *sui generis*, the prescription of the Civil Code does not apply to them, from which it may be taken as a general rule in such matters as that unless a law under which an assessment is levied provides a limitation none exists.

On a full consideration of the case we think the decree appealed from should be reversed, and that a decree should be entered by the circuit court in favor of the complainant for the sum of $6,000, with 8 % interest from June 6th, 1876, as stipulated in the warrants sued on, and that an account should be taken of all the drainage assessments, including those reduced to judgments against the city, as assessee of the streets, squares, and other public places, as well as the assessments against private property and persons, allowing credits for the amounts heretofore collected and properly expended, but without allowing for the bonds issued under the act of 1872. Opportunity should be given the holders of outstanding purchase warrants of the character of those held by the complainant to come before the master on the invitation contained in the bill and make proof of the amounts due them, and they should be admitted to share in the trust fund upon offering to contribute to the cost and expenses of the litigation.

In accordance with these views and to prevent any unnecessary delay arising from a misunderstanding of the findings now and heretofore expressed by this court and the supreme court, the circuit court is directed to enter a decree as follows:

1. It is decreed that the city of New Orleans is a debtor to John G. Warner, complainant, in the sum of $6,000, with 8 % interest thereon from June 6th, 1876, as stipulated in the warrants sued on, and that he is entitled to be paid said sum, in principal and interest, out of the drainage assessments set forth in the bill filed herein.

2. The said drainage assessments, including those against
596 the defendant as assessee of the streets, squares, and other public places, as well as those against the owners of private property, be, and the same are hereby, declared to constitute a trust fund in the hands of the city of New Orleans for the purpose of paying the claims of complainant and other holders of the same class of warrants issued under the act of sale from Warner Van Norden, transferree, to said city under authority of act No. 16 of the legislature of the State of Louisiana, approved February 24, 1876.

3. That it be referred to one of the masters of the court to take and state an account of all said drainage assessments, and for that purpose he is authorized to require the production before him of the assessment-rolls and other records appertaining to such drainage assessments by any person having possession thereof, and to examine witnesses touching all such matters. In taking and stating said account the master is directed to charge the defendant as well with the amount of drainage assessments against the city on the area of the streets, squares, and public places, as with those against the owners of private property, with interest thereon as prescribed by law, and to give credit only for the sums already collected and properly expended by the defendant in the execution of the trust, but that no offset be allowed for the bonds issued in exchange for drainage warrants under the act of 1872.

It is further ordered that said master give thirty days' notice by advertisement in a newspaper published in the city of New Orleans to all holders of warrants issued, as aforesaid, to appear before him and establish their claims.

And it is further ordered that said warrant-holders be entitled to establish their claims before the master in the first instance without being required to file formal interventions or to obtain special leave of court, and that they be entitled upon making satisfactory proof to the full benefit of the proceeding.

5. It is further decreed that upon the coming in of the master's report and its confirmation the complainant and all those who have established claims under the fourth clause of this decree will be entitled to an absolute decree against the defendant for the amounts found due them, if the fund established by the accounting shall be sufficient, but if not sufficient to pay such claims in full, then for the proper *pro rata* thereof, and shall be entitled to have execution therefor.

It is further ordered that the complainant and all other parties in interest have leave to apply to the court for such other and further orders as may be necessary from time to time to carry this decree into full effect, and that the defendant pay all costs of this suit.

For the purpose of awarding the relief to which the complainant is entitled, the decree appealed from is reversed at the cost of the appellee, with directions to the circuit court to enter the decree herein prescribed, and otherwise to proceed in the cause in accordance with this opinion.

(Endorsed:) Filed May 17, 1898. J. M. McKee, cl'k. Seal United States circuit court of appeals, fifth circuit.

597 United States Circuit Court of Appeals for the Fifth Circuit.

I, J. M. McKee, clerk of the United States circuit court of appeals for the fifth circuit, do hereby certify that the foregoing 596 pages, numbered from 1 to 596, inclusive, contain a true copy of the record and all proceedings had, including the opinions of the court, in the cases of John G. Warner *vs.* City of New Orleans, Nos. 364 and 691, as the same remains upon the files and records of said United States circuit court of appeals.

Seal United States Circuit Court of Appeals, Fifth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of New Orleans, this 30 day of November, A. D. 1898.

J. M. McKEE.
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

597½ [Endorsed on cover:] Case No. 17,225. U. S. C. C. of appeals, fifth circuit. Term No., 640. The City of New Orleans, petitioner, *vs.* John G. Warner. Exhibit to petition for writ of certiorari. Filed December 17, 1898.

598 In the Supreme Court of the United States, October Term, 1898.

CITY OF NEW ORLEANS, Appellant,
vs.
JOHN G. WARNER, Appellee. } No. 640.

It is hereby stipulated and agreed that the certified copy of the transcript of the record and proceedings in the circuit court of appeals for the fifth circuit now on file in the clerk's office of the Supreme Court of the United States shall be taken, considered, and construed in all respects as a return to the writ of certiorari issued by the Supreme Court herein.

January 24, 1899.

S. L. GILMORE,
City Attorney.
BRANCH K. MILLER,
Solicitor for Defendant.
R. DE GRAY,
J. D. ROUSE,
WM. GRANT,
Attorneys for Appellee.

I, J. M. McKee, clerk of the United States circuit court of appeals for the fifth circuit, do hereby certify that the foregoing and above one page is a true and perfect copy of the agreement of counsel in the above-named cause as the same now remains of record and on file in my office.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, in the city of New Orleans, this 25th day of January, A. D. 1899.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

J. M. McKEE,
Clerk of the United States Circuit Court of Appeals, Fifth Circuit.

599 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the fifth circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which John G. Warner is appellant and The City of New Orleans is appellee, which suit was removed into the said circuit court of appeals by virtue of an appeal from the circuit court of the United States for the eastern district of Louisiana, and we being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals

600 and removed into the Supreme Court of the United States, do hereby command you that you send, without delay, to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 21st day of January, in the year of our Lord one thousand eight hundred and ninety-nine.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

601 United States Circuit Court of Appeals for the Fifth Circuit.

In accordance with the agreement of counsel, a certified copy of which is made a part hereof, return is now made to the within writ that the transcript of record now on file in the office of the clerk of the Supreme Court of the United States in the case of John G. Warner, appellant, and The City of New Orleans, appellee, is a full, true, and perfect transcript of the record and proceedings in said cause in the United States circuit court of appeals for the fifth circuit.

Given under my hand and the seal of said United States circuit

FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

court of appeals, hereto affixed, at New Orleans, Louisiana, this 25th day of January, 1899.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

J. M. McKEE,
Clerk of the United States Circuit Court of Appeals, Fifth Circuit.

[Endorsed:] 17,225. Supreme Court of the United States. No. 640, October term, 1898. The City of New Orleans *vs.* John G. Warner. Writ of certiorari and return. Received Jan'y 24, 1899. J. M. McKee, clerk. Filed Jan. 27, 1899. J. H. McK., cl'k.

602 Supreme Court of the United States, October Term, 1898.

CITY OF NEW ORLEANS, Petitioner,
vs.
JOHN G. WARNER, Respondent. } No. 640.

It is admitted that the annexed map, marked "Sketch of draining sections of New Orleans," &c., was offered in evidence by complainant in the United States circuit court and was used on the argument of the cause in said circuit court, & was also filed and used in the United States circuit court of appeals for the 5th circuit, and that the same is properly a part of the record in the above cause (see printed Record, p. 209), and it is agreed that the same — filed herein and be printed and annexed to the printed record herein.

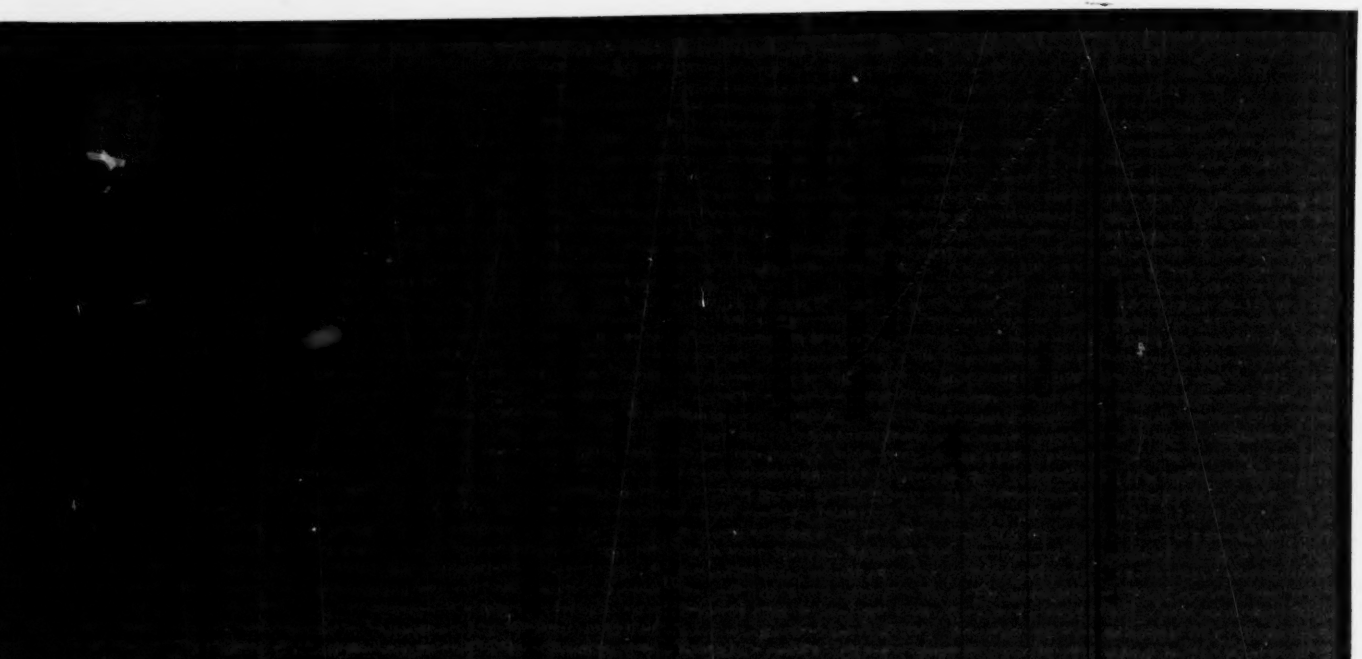
RICHARD DE GRAY,
Solicitor for John G. Warner, Respondent.

S. L. GILMORE,
City Attorney,
BRANCH K. MILLER,
Solicitors for Defendant.

(Here follows map marked p. 603.)

[Endorsed on back of map marked p. 603:] No. 691. Warner *v.* City of New Orleans. U. S. circuit court of appeals. Filed Mar. 12, 1898. J. M. McKee, clerk. Dec. 21, '97. H. J. Carter, ex'r. No. 12350. U. S. circuit court. Offered by compl't & filed Jan. 17, 1898. H. J. Carter, d'y clerk. Offer No. 68, compl't- —, p. 209.

604 [Endorsed:] File No., 17,225. Supreme Court U. S., October term, 1898. Term No., 640. The City of New Orleans, petitioner, *vs.* John G. Warner. Stipulation and addition to record. Filed Feb. 24, 1899.



IN THE

Supreme Court of the United States.

OCTOBER TERM, 1898.

THE CITY OF NEW ORLEANS, A MUNICIPAL CORPORATION, PETITIONER,

versus

JOHN G. WARNER, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI, REQUIRING THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, TO CERTIFY TO THE SUPREME COURT OF THE UNITED STATES, FOR ITS REVIEW AND DETERMINATION, THE CASE OF JOHN G. WARNER, APPELLANT, VS. THE CITY OF NEW ORLEANS, APPELLEE, NO. 691, NOVEMBER TERM, 1897.

To the Honorable the Supreme Court of the United States:

The petition of the City of New Orleans, respectfully shows:

1. That it is a municipal corporation, created by the acts of the general assembly of the State of Louisiana, No. 20, of the session of 1882, and No. 45, of the session of 1896, and a citizen of said state.

2. That on November 26th, 1894, John G. Warner, a citizen of the State of New York, in the Circuit Court of the United States for the Eastern District of Louisiana, brought his bill in his own behalf, as well as on behalf of all other parties holding obligations of the same nature and kind as himself, to charge petitioner as the debtor of certain taxes averred to have been levied by lawful authority, for the payment of certain warrants, the collection of which was made the duty of petitioner, by certain statutes, hereinafter more particularly described; that the liability of the city was averred, as the result of a certain contract which it was alleged she had broken, and her asserted disregard and violation, of certain duties imposed upon her by statute, as to the prosecution of certain work of drainage, and the collection of taxes aforesaid.

3. That it was averred by the bill, that by Act No. 165 of March 5th, 1858, the legislature of the State of Louisiana provided for the leveeing, draining and reclaiming of swamp lands in certain portions of the parishes of Orleans and Jefferson, which for such purpose were divided into three draining districts, to which, by a subsequent act of said legislature, a fourth draining district was added; that the appointment of a Board of Commissioners was provided for each district, who were invested with all rights and powers necessary to drain the same; that said boards were authorized to cause plans of said districts to be made, designating the limits of the sections or districts to be drained, the subdivisions of property therein contained, and the names of the proprietors; also, the dimensions and directions of the canals to be dug, and the places where pumping engines were to be placed; that upon completion, these plans were to be deposited in the office of the recorder of mortgages of the parish in which the section or district to be drained was situated, and notices were directed to be inserted, in French and English, in two newspapers, for a stated period, announcing that the commissioners would proceed to drain such section, defining the limits thereof, and indicating as nearly as possible when the draining thereof would complete, and also the possible cost of the work; that after publication had been made for a designated period, the commissioners were directed to apply by petition to a court in the parish of Orleans, for that portion of the section or district lying within that parish, and to the district court for the parish of Jefferson, for that portion of the section or district lying within that parish; which courts were directed, upon due proof being made of the publications or notices, to decree that each portion of the property situated within said limits was subject to a first mortgage, lien or privilege, in favor of the commissioners, for such an amount as might be assessed against said section or district, and interest thereon at 6 per cent. per annum from demand; that the said decrees should be recorded, by the recorders of mortgages for the parishes of Orleans and Jefferson, which lien, privilege and first mortgage, it was declared, should take precedence over all other mortgages, liens or privileges whatsoever, whether tacit, conventional, legal or judicial.

4. That the said commissioners were given authority to levy such uniform assessment or assessments, upon the superficial or square foot of lands situated within their respective draining districts or sections, to defray the expenses of the construction of levees, machinery, canals and other works necessary for the purpose of carrying out the provisions of the act; that it was further provided, that on the non-payment of said assessments, judgments should be recoverable, before any court of competent jurisdiction, and the lands assessed should be sold, according to law.

5. That by Act No. 191 of the general assembly of the State

of Louisiana, approved March 17th, 1859, provision was made for the issue of bonds, designated as "Draining Bonds," in order to carry into effect the provisions of Act No. 165 of 1858; that upon the issuance of the bonds, the Board of Commissioners should fix and determine the amount of the assessment, to be levied upon the superficial or square foot of the lands situated within the draining district of each board, in accordance with the act of 1858, and to fix and apportion the amount to be paid yearly by the owners of said lands, in order to pay the interest on said bonds as might mature, and the manner of redeeming such bonds, was provided for in other sections of said act of 1859.

6. The bill further recites, that by the act of the legislature of the State of Louisiana No. 57 of 1861, entitled "An Act to Provide for the Collection of the Assessments for Drainage, Under the Acts of March 18th, 1858, and the Supplementary Act thereto of March 17th, 1859," it was enacted, that the amount of assessments levied as aforesaid, should be collected and sued for in the manner following: That as soon as any assessment had been made, notice thereof should be given, a copy filed in the Third District Court of New Orleans, for assessments on property within that parish, and in the Third Judicial District Court for the parish of Jefferson, for assessments made on property within that parish; that the said tableaux of assessments to be thus filed should set forth the amounts assessed, and the names of the owners of the lands, if known, and if the owners' names were unknown, the fact to be so stated; that a petition should be filed with the said assessment rolls, praying, and an order rendered thereon, that all persons whom it might concern should show cause, within thirty days from the first publication, if any they had, why said assessment rolls should not be approved and homologated, and that after due observance of this requirement, the said courts should, upon motion of counsel for the Boards of Commissioners, approve and homologate said assessment rolls, which should be a judgment against the property assessed, and the owners thereof, on which execution might issue, as on judgments rendered in the ordinary mode of proceedings.

7. That by the act of the legislature of the State of Louisiana, No. 30, of its session of 1871, the Mississippi & Mexican Gulf Ship Canal Company, a corporation then existing, and domiciled in the City of New Orleans, was authorized and empowered to excavate drainage canals and build protection levees within the limits of New Orleans and Carrollton, on the terms and condition expressed in said act, and authorizing said company to excavate all canals, and to build all levees, to be designated and fixed by the Board of Commissioners of the City of New Orleans, the said act itself pointing out in certain parts, how and by what means the work of drainage should be

executed by said company, and prescribing certain other details thereof; that by said act it was made the duty of the city surveyor of New Orleans, or an engineer appointed for that purpose, to examine the work done by said company during each month, and certify to the same; that it was made the duty of the administrator of accounts, on presentation to him of said certificate, to draw a warrant on the adminstrator of finance, in payment of the work so done, at the rate of fifty cents per cubic yard for excavations, and fifty cents per cubic yard for levees built; that these warrants it was the duty of the administrator of finances to pay on presentation to him, in case there were any funds in the treasury to the credit of said company; but that in the absence thereof, in whole or in part, the said adminstrator was required to endorse upon each warrant not so paid, the date of its presentation; from which date it should bear interest at the rate of eight per cent. per annum, until paid.

That in order to provide funds for the payment of such work, the Boards of Commissioners for each one of the several districts aforesaid were directed to transfer to the Board of Administrators of New Orleans, all moneys, assessments, and claims for damages, in their hands, or under their control, all titles to real estate, books, plans, tableaux and judgments in favor of the commissioners, the office furniture of the latter, a true statement of the claims of the commissioners against the City of New Orleans, to be adjudicated and settled out of money collected by the city, and pertaining to said drainage districts; and that the Board of Administrators should be and were thereby subrogated to all rights, powers and facilities, possessed by the commissioners of the several districts, and the said Board of Administrators were directed to collect from the holders of property within the districts the balance due on the assessments, as shown by the books, which the bill avers were thereby confirmed and made exigible; to make an assessment of two mills per superficial foot in those parts of the three existing drainage districts, and on such other lands as should be brought within the protection levees contemplated by said Act No. 30, of 1871, where no assessments had been made; and to execute and enforce the same, as provided by the several acts of the legislature creating and regulating said Boards of Commissioners; that all moneys so received from said commissioners, as well as by the collection of claims for drainage then due, and from the collection of assessments, and from any of the sources contemplated, should be placed to the credit of the Mississippi and Mexican Gulf Ship Canal Company, to be held as a fund applicable to the drainage of New Orleans and Carrollton; and that all property, not money, so received, should be held in trust for the payment of said company.

8. It is further set up in the bill, that in accordance with the

direction to that end contained in Act No. 30, of 1871, the Board of Administrators of the City of New Orleans, by ordinance, created the fourth drainage district, embracing lands not contained in any of the three districts established by the act of 1858.

9. Proceeding, the bill sets forth, that the Boards of Commissioners were duly appointed, qualified, and entered upon the discharge of their duties, and did all of the acts, such as the making of plans, procuring the homologation of the same, the levying of the assessment, and having the same homologated by judgment, in accordance with the provisions of the several statues hereinbefore mentioned.

10. The bill charges, that the Board of Administrators of the city, in compliance with Act No. 30, of 1871, took possession of all the moneys, rights and privileges described in said act, and became possessed of all the means necessary to carry out the objects of the statutes aforesaid, and provide for the payment of all drainage warrants that might be issued under said act No. 30, of 1871; that the amount of the assessment handed over to the City of New Orleans, in the first and second districts, was $790,621.42; those in the third and fourth districts was $909,915.74; making a total of $1,699,637.16, of which there was assessed against the city herself, on streets and squares, as follows: in the first district $223,110.60, in the second district $199,885.47, in the third district $207,441.46, in the fourth district $65,956.77; that on these assessments there had been collected from individuals, by the City of New Orleans, between the time she took charge, as aforesaid, and the 7th of June, 1876—the date of the sale from Van Nordon and the Canal Company to the city, thereafter referred to in the bill—in cash, $78,748.51, and in drainage warrants, paid in pursuance of ordinance 2460, annexed to the bill as part of is, $151,174.16, leaving outstanding and due, on the books, a balance of $1,499,714.47, including the said sums which the bill claims were due by the city herself on street and squares.

11. That on the 22d of May, 1872, the Canal Company, for a valuable consideration, assigned, transferred and set over, to Warner Van Norden, all its right, title and interest in and to the privileges and advantages granted it by the aforesaid act No. 30, of 1871; and by another act of sale, on November 22d, 1872, the company, for a valuable consideration, sold and delivered to said Van Norden all of its dredgeboats, derricks, flatboats, and other property used in dredging.

12. The bill then avers that from the time the said Board of Administrators took charge, in June, 1871, pursuant to said act of 1871, a vast amount of drainage work had been done by the Canal Company and Van Norden, its transferee; that twelve miles of old canals were widened and deepened, and thirteen miles of new canals were dug, and that a corresponding amount of protection levees were built; the

said work being in all respects conformable to the acts of the legislature, and the designs of the Board of Administrators, who duly approved and accepted the work; that to complete the entire system of drainage it was only necessary to complete a gap on the shore of Lake Pontchartrain, and the placing in position of the pumping engines on the lake shore, which was the duty of the city, under said Act No. 30, of 1871.

13. It is then averred by the bill, that by Act No. 16 of the legislature of Louisiana, approved March 24th, 1876, the city was authorized and empowered to contract with the Canal Company and Van Norden, as transferee thereof, for the purchase of the former's rights, franchises, tools, apparatus, implements, machines and boats, the purchase price to be paid in drainage warrants, payable out of drainage taxes, imposed under the several acts of the legislature hereinbefore set forth; and that after an appraisement, on the 7th of June, 1876, the said purchase was made, the city receiving from the said company and its transferee, the machinery, boats and other property of great value, for which it agreed to pay in drainage warrants three hundred thousand dollars, which were delivered to Van Norden, transferee, aforesaid; that complainant is the owner of three of said warrants, for the sum of two thousand dollars each; that the suit is brought thereon, as well as on the assignment, transfer and subrogation of Van Norden to complainant, of all his right, title and interest in and to said warrants, as well as of each and all rights of action which he had or has against the City of New Orleans, arising in his favor out of the said act of sale of June 7th, 1876, or the action of the City of New Orleans thereunder, by reason of its failure to collect said drainage taxes, or by reason of the city to complete the drainage work, to the end that said taxes might be collected.

14. The bill then recites, that the said Act No. 16, of 1876, providing for the payment of the purchase price of said dredgeboats, and other property, and by the issuance and delivery of drainage warrants, payable out of drainage taxes, was a new designation of said taxes by the legislature, which could not be diverted until said drainage warrants were fully paid, and placed said taxes beyond any claim that could be urged against them by the City of New Orleans, or by any other party or person whomsoever, especially as the city became the owner of said dredgeboats, fanchises and implements, without paying her own money or property, or giving any personal obligation therefor.

15. That after said purchase the city alone was possessed with sole power, as well as the necessary tools and outfit, to complete the necessary system of drainage, and had the duty cast upon her to complete said system, or build and complete some other system of drainage; but that from the date of said purchase, in June,

1876, and notwithstanding said drainage work had, from the very commencement thereof, by the company, in 1871, and the prosecution thereof by Van Norden, as transferee, from May, 1872, been proceeded with with great vigor, and over two-thirds thereof had been completed, the city ceased all work on said system, and never thereafter commenced or completed any other, but sold some of the machinery so purchased, diverted the proceeds of taxes to other purposes than the payment of drainage warrants; and allowed others of said boats to sink or rot unused, and all notwithstanding that they were in first-class condition when received from the vendor; and thus rendered herself incapacitated for the completion of the drainage work aforesaid, or for any other work of drainage whatsoever; allowed the canals dug by said company and transferee to fill up, and to remain filled, with filth and sediment, thus becoming useless and worthless, and, in fact, destroyed a vast amount of work already done, to a very large extent.

16. The bill further sets out, that ever since its purchase the city had done nothing to compel or enforce the payment of drainage taxes, except to keep an office in the City Hall, where the agent of Van Norden might induce drainage taxpayers, by persuasion, to pay their taxes, where some were paid, but the amount unknown to complainant, and that the same had never been accounted for; that the city, by proclamation of its mayor, advised the taxpayers not to pay the taxes, and by reason of her conduct in not completing the system, nor adopting any other to drain the land, the Supreme Court of Louisiana, in Davidson vs. New Orleans, in March, 1882 (34th La. An. Rep., pp. 170 to 178), decided that the said taxes could not be collected, which decision from the date thereof, became the settled jurisprudence of the state, whereby large amounts of drainage taxes were cancelled, and that the remaining had become of little or no value; that the city, by report of a special committee of its council, pointed out to drainage taxpayers, how, under the Davidson decision, they might avoid payment thereof, which suggestion put forth by the city, while trustee of the said fund, and the collector thereof, had ever since been largely adopted and enforced, and large amounts of drainage taxes erased and lost in consequence thereof; that in suits brought by taxpayers for this purpose the city made no defense; that the city, by other ways and means unknown to complainant, destroyed said fund, until, so far as the courts of Louisiana were concerned, the same became unenforceable, and so, utterly worthless to the holders of the warrants given for the purchase of the dredgeboats, etc.; this express violation of the express covenant contained in said act of sale and purchase, not to obstruct or impede, but, on the contrary, facilitate by all lawful means, the collection of said drainage tax judgments, until all of said warrants should have been paid in full."

The bill proceeds, averring, that on some occasions the city had claimed the drainage taxes as her own property, and been allowed the full benefit thereof in payment of her own debts, especially in a certain suit, where, being sued for an indebtedness of the Commissioners of the City Park, in a large sum of money, she claimed said sum sued for, should be credited upon the drainage taxes, amounting to $25,725.96, assessed against another portion of the tract of land, concerning which the city was sued; that this offset was allowed, for which, with 6 per cent. per annum, from the date of its allowance, she should account to the warrant-holders; the bill then proceeds to vindicate the excellence of the plan according to which the work was to be done, which it charges, if carried out, would have protected the lands from overflow from without, and would have removed all drainage from within.

17. The twenty-fourth paragraph sets forth, that at the time of the sale by Van Norden and the Canal Company to the city, the drainage assessments then uncollected amounted to $1,469,715.41; that the city, after her said purchase, not only had all the necessary authority, outfit and equipment, to have completed the said system of drainage, or to have adopted or completed some other sufficient system that would have drained the lands, and made them available for the payment of the warrants given for the purchase aforesaid, but that she had likewise an unexhausted and unrestrained power of taxation, under which, by a tax on all the property within the City of New Orleans, she could have supplied herself with sufficient means to have completed said system, or any other system; but that, in violation of her duty, and in repudiation of her obligation, she abandoned all pretense of draining, in any way whatever, and destroyed the very source from which she had bound and obligated herself to pay the warrants given for said purchase, sometimes pretending that the said taxes were illegal and unconstitutional, by reason of certain acts of the legislature of Louisiana, all of which, the bill avers, were void, as repugnant to the Constitution of the United States, especially section 10, article 1, and the 14th amendment thereof; and at other times pretending that said taxes were uncollectible, because the lands were not worth the amounts imposed thereon; which complainant avers, was without foundation in fact, the only reason why the lands on which the taxes were levied were not worth the amount of the taxes being because the city had refused to drain them, either by completing the system, or keeping open and cleaning the canals already dug.

It is then charged, that by the said act of purchase of 1876 the city, in addition to the former duties imposed upon her, of trustee for the collection and payment of said taxes, became the voluntary and contractual trustee for the collection of taxes then due, and was bound to use her utmost authority for the collection of the same,

under the terms of the said sale, and to disregard all the illegal and unconstitutional acts of the legislature aforesaid; thus having done everything in her power to destroy said taxes, and defeat their collection, notwithstanding various suits brought against her for her dereliction of duty in this regard, which suits are enumerated; that in consequence she had become accountable to complainant and other holders of drainage warrants, for all moneys collected and not paid to drainage warrant holders, for all moneys misapplied, and also for such sums as might have been collected, had the city done her duty in the premises, and which have become lost and wasted because of the said nonfulfillment of duty as voluntary and contractual trustee, between the time she took charge, in June, 1871, to the time a receiver was appointed, in June, 1891, especially between the date of the sale by Van Norden and the company, June 7th, 1876, to June 13th, 1891.

18. The matter contained in the twenty-sixth paragraph of the bill, as to complainant's anticipation that the city would plead its issue of certain bonds, in discharge of the liability sought to be fixed upon it, may be disposed of by a mere reference, as the answer to a certified question from the Court of Appeals to this Honorable Court, to be hereafter more particularly dealt with, renders this part of the bill unimportant for the present purpose.

19. On February 4th, 1895, defendant filed its demurrer to the bill, general and special; the points made by the said demurrer were:

First. A denial of the jurisdiction of the Circuit Court, on the ground that plaintiff suing, as the assignee of Van Norden, himself the assignee of the Canal Company, which was a citizen of the State of Louisiana, was incompetent to maintain a suit in the Circuit Court against the defendant, likewise a citizen of Louisiana, the act of Congress prohibiting such suit by the assignee of a chose in action, where the assignor could not maintain such a suit.

Second. That all the matters and things alleged in the bill, had been finally adjudged by the Circuit Court in the case of Peake vs. New Orleans, as also, on appeal, by the Supreme Court, as would appear by its decision in volume 139 of the United States Reports, p. 342.

On February 26th, 1895, the demurrer of the defendant was sustained, and the bill dismissed, at the costs of complainant; whereupon the case was carried by appeal to the Court of Appeals for the Fifth Circuit.

20. On May 14th, 1895, the Court of Appeals, upon a statement made by itself, requested the instruction of this Honorable Court upon two points, stated in the following questions:

First. Is the City of New Orleans, under the warranties, express or implied, contained in the contract of sale of June 7th, 1876, by

which she acquired the property and franchises from Warner Van Norden, and under the averments of the bill, estopped from pleading against the complainant the issuance of bonds to retire $1,672,105.21 of drainage warrants issued prior to said sale, as a discharge of her obligation to account for drainage funds collected on private property and as a discharge of her own liability to that fund on account of assessments on streets, public squares, etc.?

Second. Should the decision in the case of James W. Peake vs. City of New Orleans, 139 U. S., p. 342, be held to apply to the facts in this case, and operate to defeat the complainant's action?

The first of these questions this Honorable Court answered in the affirmative; the second it declined to answer.

Warner vs. New Orleans, 167 U. S., pp. 473-478.

On May 31st, 1897, the mandate of the Supreme Court was filed in the Court of Appeals; whereupon, on June 10th, 1897, the Court of Appeals reversed the decree of the Circuit Court, and remanded the cause, with instructions to overrule the demurrer, and thereafter proceed as equity and good conscience may require.

The opinion found in 81st Fed. Rep., p. 650, is based upon two grounds:

First. That the city is estopped from pleading her bond issue as a discharge of her obligation to account for drainage taxes collected on private property, and as a discharge of her own liability to that fund, as assessee of the streets and squares; citing Warner vs. New Orleans, 167 U. S. 467; thus following the answer of the Supreme Court to the first question certified.

Second. That on the case made by the bill, the decision of the Supreme Court in Peake vs. New Orleans, 139 U. S. 242, does not *necessarily* apply to the facts of the present case, nor operate to defeat the complainant's action.

The opinion then stating, that "it follows that the Circuit Court erred in sustaining the demurrer to the complainant's bill."

21. After the filing of the mandate of the Court of Appeals, on July 1st, 1897, and the entry of a decree by the Circuit Court, in accordance therewith, defendant, on October 30th, 1897, filed its answer, setting up specially the following defenses:

First—That the acts 166 of 1858, 191 of 1859, 57 of 1861, and 30 of 1871, propounded a system of drainage for the City of New Orleans, the expense of which was to be borne by the owners of the lands drained, to be collected from them by assessments based upon the prospective benefits proposed by the drainage; that the assessment rolls, like the plans preceding them, were to be filed in certain courts, and while these assessments, levied in advance for prospective drainage and benefit to the lands, imported no liability if the drainage failed, and was of no benefit to the lands, the acts providing for the

homologation of the plans, though creating only such provisional liability, should subject the lands to a lien and privilege to secure the cost of the drainage; and that the judgments homologating the assessment rolls, though creating only such conditional liability, should be judgments against the lands and owners thereof, on which execution might issue; that said plans and assessments, without warrant or authority of law, embraced public streets, parks, squares, and other places, or "public things," not subject to taxation, or to assessment for local improvements, or to any form of taxation; that as to the assessments on property owned by private persons, based on prospective or anticipated draining, they were resisted by the owners, on defenses which were sustained by the courts.

Second—A special denial that the assessments on public streets, parks, squares, or other "public things," were, or were ever due or owing; together with a denial that the act of 1871, or any other act, confirmed or made exigible such void assessments; that the inclusion by the said Boards of Commissisoners of the public streets, and places of like character, was illegal; that the act giving the Board of Administrators authority to create the fourth drainage district was unconstitutional, as was held by the Supreme Court of the State of Lonisiana in the succession of Patrick Irwin, 33d La. An. Rep., p. 63.

That no judgment of homologation or approval by any court, particularly such as were averred in the bill, could exceed, transcend, or have any greater effect, than the authority contained in several acts, so as to permit or give any validity to assesments for taxes other than those made upon or against private property, or property owned by private persons, nor could they in any manner, or to any extent, give validity to any assessments made or taxes levied against public parks, public squares, or other "public things," or to create even the color of a charge of liability against the City of New Orleans.

Third. That the work done by the company and its transferee was defective and insufficient, and that by reason of the defective plan by which it was constructed, its failure was inevitable.

Fourth. That in 1876 the general assembly of the state, by Act No. 16 of that year, was constrained to dispense with the services of the company and its assignee, and to authorize the purchase by defendant of the dredgeboats, franchises, and other property of the company, for a price in drainage warrants, payable out of drainage taxes.

Fifth. That there was no obligation imposed on defendant by the act of 1871, or the act of 1876, or in any manner by law, to the warrant holders, or to the payment of warrants, or in respect to the same, save a proper diligence to collect the taxes out which the same

were payable, and apply the collections to their payment, and that the duties thus imposed by the legislature, defendant had fully performed.

Sixth. A denial of any destination by the act of 1876 of the drainage taxes, otherwise than to direct that those collected be applied to pay the warrants, and it was denied that the act of 1876 gave any validity to the void assessments and taxes on public streets, and property of a like character; also, that a single dollar of taxes collected from private property had ever been diverted from drainage warrant holders, the single obligation of defendant being to account for taxes collected; a denial was further made that the city, under the act of 1876, was made the voluntary and contractual trustee for the collection of the same.

Seventh. A denial that prior to the act of 1876, there was imposed upon the city the duties of a trustee for the collection and payment of drainage taxes, or any duty whatsoever, save to account for the collection of assessments on private property; that defendant discharged its full duty under the act of 1876, as to the collection of taxes, the failure to collect many of which was due to the law applicable to the same, as laid down by the Supreme Court of Louisiana; that its efforts to collect were continued and persistent; that all that could be collected had been collected and accounted for.

Eighth. A denial of any neglect of duty with regard to the work of drainage, or its completion.

Ninth. A denial of any failure or neglect to defend suits, brought for the cancellation of drainage taxes.

Tenth. A denial that the acts of the legislature of Louisiana, Nos. 48 and 67, of 1877, and No. 20, of 1882, section 42, were void, as in violation of the constitution of the United States.

Eleventh. That by its bond issue of $1,672,105.21, under Act No. 73, of 1872, if respondent were liable for the assessment on streets, and places of a like character, the same was fully paid by said issue of bonds, which latter was fully known to all drainage warrant-holders, especially to Van Norden; that he, or his assignees or pledgees, were holders of a large amount of drainage warrants redeemed by said bonds; that they were fully apprised of the said bond issue, and the discharge resulting therefrom, and that complainant cannot urge that defendant did not assert said discharge, known in its full scope and effect at all times to Van Norden, and never controverted by him, or any warrant-holder.

Twelfth. A denial that the act of 1876 was in any line or word a recognition of the so-called "drainage fund," as it then stood on the records of the city or mortgage office, and had not been discharged in any manner, etc.

Thirteenth. That the dredgeboats and other property acquired by respondent from the company and Van Norden were of little or no value, and, in any event, infinitesimal as compared with the price paid, and that the sale thereof for the amount paid was a fraud upon defendant and its taxpayers.

Fourteenth. That all taxes collected had been faithfully accounted for; that in the suit of Peake vs. New Orleans, No. ——— of the Circuit Court, defendant had been ordered to render, and had rendered an account of all drainage taxes, and there was no reason to renew the call or order for such account.

Fifteenth. That by the amendment of the Constitution of the State of Louisiana proposed by the general assembly in 1874, and which went into effect January 1st, 1875, the city was prohibited from thereafter increasing its debt in any manner, or from issuing any evidence of debt, or warrant for the payment of money, except against cash in the treasury, the said amendment providing that it should not prevent the issue of drainage warrants, to said Van Norden, transferee of said company, under Act No. 30, of 1871, but payable only from drainage taxes.

That said warrants, by the law of their creation payable only from drainage taxes, never, after that amendment, could become part of respondent's debt, nor could any omission of duty on the part of respondent, in respect to drainage, the collection of taxes, nor any act or conduct of respondent, nor any act of the general assembly, nor purchase of property under said act, bind or obligate respondent, after such amendment, for the payment of any such drainage warrants, or for the purchase price of said property, or for any drainage warrants issued for such price, or for any debt or liability whatever in respect to drainage; nor did said act of 1876, or contract of purchase, attempt to impose on this respondent any such prohibited liability, but in accordance with said amendment, the price of the property directed by said act to be purchased, could be paid only from assessments on private property, out of drainage taxes alone.

Sixteenth. The defense based upon the decree of the Circuit Court, and of the Supreme Court, in J. W. Peake vs. New Orleans, No. 11,614 of the docket of the Circuit Court, and No. 852 of the October Term of 1890 of this court, which decrees of said courts are *res judicata*.

Seventeenth. That the demands of complainant set up in the bill were barred by the prescription or statute of limitation of five years, established by articles 3540 and 3541 of the Revised Civil Code of Louisiana; also by the prescription or statute of limitation of ten years, established by articles 3544 and 3547 of the Civil Code.

22. That after filing of complainant's replication, and the taking of evidence, the cause came on to be heard in the Circuit Court, and

In March, 1898, the Circuit Court entered a decree in favor of the defendant, dismissing the bill; on March 12th, 1898, complainant was allowed an appeal to the Court of Appeals; that on April 2d, 1898, the case was called for trial in that court, before Judges Pardee and McCormick, Circuit Judges, and Swayne, District Judge; that on May 17th, 1898, the court made a decree, finding:

First. The City of New Orleans a debtor to complainant in the sum of six thousand dollars, with eight per cent. per annum interest from June 6th, 1876, as stipulated in the warrants sued on, to be paid out of the drainage assessments set forth in the bill.

Second. That said assessments, including those against the defendant, as assessee of the streets, squares, and other public places, as well as those against the owners of private property, were declared to constitute a trust fund in the hands of the City of New Orleans, for the purpose of paying the claims of complainant, and other holders of the same class of warrants

Third. That it be referred to one of the masters of the court, to take and state an account of all said drainage assessments; that in taking such account the master was directed to charge the defendant, as well with the amount of drainage assessments against the city, on the areas of the streets, squares and public places, as with those against the owners of private property, with interest thereon as prescribed by law, and to give credit only for the sums already collected, and properly expended by defendant, in the execution of the trust, but that no offset should be allowed for the bonds issued in exchange for drainage warrants, under the act of 1872.

The opinion of the court was delivered by Swayne, District Judge, and was based upon the following considerations:

First. That the attempt of the answer to fasten the responsibility for alleged defects in the drainage plan upon the Canal Company and Van Norden, as a defense to the action, was entirely unsupported by the evidence.

Second. That the city was a trustee, under the express duty to do whatever was reasonably required to make the drainage fund available; that it was by reason of her own default, in not completing, but abandoning the work, that this was not accomplished; that equity looks upon that as done which ought to have been done; that the city must, therefore, be treated as having done whatever was necessary to render the assessments available, and should be held to account for the drainage fund as if collected and in hand; that the city, under the principles laid down by the Supreme Court of the United States in the present case, was estopped to deny that the assessments upon streets, and other public places, and the judgments thereon, were void *ab initio;* that she was thus estopped to the same extent as she was from setting up the issue of bonds under the act of 1872, as a discharge of

her general liability as trustee, with reference to the fund; that as an original proposition, however, the authorities *seemed* to affirm the liability of a municipal corporation for its proportion of the cost of local improvements, independently of the existence of an estoppel.

Third—That by certain decisions of the Supreme Court of Louisiana, it was held, that the City of New Orleans was liable for the assessments made on the area of streets, under statutes similar in all respects to the acts here involved, except that the assessments in the cases cited had not been ratified by the legislature, as had been done in this instance by the act of 1871; that the matter of local assessments had been the subject of judicial inquiry in other states, notably by the Supreme Court of Illinois, where all of the objections raised in the present case had been elaborately considered, and decided in harmony with the case above quoted; that whether the obligation for the drainage assessments had its origin in the original acts of 1858, 1859 and 1861, or was cast upon the city by the act of 1871, confirming the assessment rolls, upon which the city was named as a debtor, or resulted from judgments based on these rolls, the amounts of these assessments constituted a lawful debt of the city, which must be discharged by the exercise of the power of taxation, such power being the usual, and in some cases the only, method by which municipal corporations can discharge their indebtedness; citing United States vs. New Orleans, 96 U. S. 381; Wolff vs. New Orleans, 103 U. S. 358.

Fourth. That the constitutional amendment of 1874, which prohibited the city from increasing her debt in any form, or in any manner, or under any pretext, was no defense, the *assumption* to that effect being based on the theory that the assessments against the city were at the time void, and that to now enforce them would increase the city's debt; that the court could not concede the correctness of the argument that the city was not, when the amendment went into effect, the primary debtor of the assessments against private property, and that if the court should now impose a liability on the city for the dereliction of duty charged in the bill, it would create a new debt, which would come within the prohibition; the opinion declared that it was true that the amendment prohibited any increase of the city debt, after January 1st, 1875, but it also expressly provided that it should not prevent the issue of drainage warrants to the transferee of the contract, under act 30, of 1871, payable out of drainage taxes; that it seemed clear to the court that by express terms the amendment excluded, and intended to exclude from its operation, the liability of the city growing out of its relation to drainage matters, including the city's liability as assessee of the streets and public places, as shown by the assessment rolls; that, indeed, it would seem to be that the authority to issue warrants against the drainage fund after that date necessarily implied an affirm-

ance of the right of the city to proceed to the completion of the drainage work then in progress, and to impose a corresponding duty on the city to collect and apply all the drainage assessments to the payment of the warrants, and hence, that these taxes being then liabilities of the city, could not, by any cause or reason, be included in the clause prohibiting the increase of debt, without imputing to the authors of the constitution an intent to defraud those who might deal with it under the invitation of the constitution.

Fifth. That even admitting that the purchase created a debt in excess of the limitation, the most that could be said was that it made an error of law, which, according to article 1846 of the Civil Code of Louisiana, cannot be alleged to acquire the property of another.

Sixth. That the only remaining question which required consideration was the plea of prescription, which the court thought could not be maintained, for the reason that the act of sale created an express trust, in which the city undertook as a trustee to collect and apply the drainage assessments to the payment of warrants for the price of the property sold it; moreover, that it was doubtful whether statutory assessments of the character in question were subject to any prescription at all.

23. From this decree the City of New Orleans obtained an appeal to this Honorable Court, which was, on the 20th day of October, 1898, dismissed, on the authority of Union & Planters Bank vs. Tennessee, 152 U. S., p. 454, and Sawyer vs. Kochersberger, 170 U. S. 303.

24. That it having thus been established, that no appeal lies to this court from the Court of Appeals, your petitioner is moved to apply to this court for a writ of certiorari in the premises.

That your petitioner is advised and believes that the said judgment of the United States Circuit Court of Appeals for the Fifth Circuit is erroneous, and that this Honorable Court should require the said case to be certified to it, for its review and determination, under and in conformity with the provisions of the sixth section of the act of Congress, entitled "An Act to Establish the Circuit Courts of Appeals, and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3d, 1891, the said case being made final in the said Circuit Court of Appeals by said act.

25. That the questions involved in this case are of great gravity and importance; that upon its correct determination depends the liability *vel non* of the defendant for three hundred thousand dollars, with eight per cent. interest per annum from June 6th, 1876, which would amount, at the present time, to a sum in excess of eight hundred and

twenty-eight thousand dollars, the question of liability being governed by nice and difficult questions of law and fact, which have been misapplied, or not fully understood by the Court of Appeals.

26. That the case was decided in said Court of Appeals, and all of petitioner's defenses, save one—that of *res judicata*, which was not decided at all, nor even mentioned in the opinion,—overruled upon the supposed authority of the opinion of this Honorable Court in Warner vs. New Orleans, 167 U. S. 467; that as a matter of fact, of the numerous defenses set up by petitioner's answer, only one was presented and involved in the case mentioned, and that presented in manner, form and conditions, differing *in toto* from that involved in Warner vs. New Orleans, 167 U. S. 467.

27. That in said case there were certified to this Honorable Court two questions alone, the first, being whether the city was estopped to plead her bond issue as a payment of her obligation for drainage taxes collected, or which it failed to collect, and of its liability as assessee of streets and other public places; the second, whether the present case was governed by the decision of your Honors in Peake vs. New Orleans, 139 U. S. 342; that the first question this Honorable Court answered in the affirmative, and declined to answer the second at all; hence, the assumption of the court, in the first sentence of its opinion, that, "as to nearly all of the defenses raised, we might well rest our decision on the opinion of the Supreme Court, expressed in answer to the certified question," is unfounded.

28. That the court erroneously held, that under the principles laid down by your Honors in the case above mentioned, that the city was estopped to deny the existence and validity of the assessments against it, as *quasi* owner of streets and other public places, to the same extent that it was estopped from setting up the issue of bonds under the act of 1872 as a discharge of its general liability as trustee with reference to that fund, and that whether it be true or not, as the court declares, that the authorities *seem* to affirm the liability of a municipal corporation for its proportion of the cost of local improvements, independently of the existence of any estoppel, it is beyond question that the acts of 1858, 1859 and 1861, under which the assessments were levied, did not contemplate the liability of public property therefor, but were intended to include private property alone; that the language of these statutes would clearly place the assessments on public property in question beyond the reach of the principle which the court declares *seemed* to be affirmed by the authorities.

29. That the decisions of the Supreme Court of Louisiana cited in the opinion to sustain the proposition that streets, and property of a like character, were liable to assessment, are all based upon special statutes, presenting no feature in common with those involved here, as concerns the questions at issue.

30. That the court erred in holding that the constitutional amendment of 1874, prohibiting the city from, in any form or in any manner, or under any pretext, increasing its debt, was an authority for, instead of a prohibition against, any increase of debt; that the authority therein contained to draw drainage warrants, payable out of drainage taxes, which the court says necessarily implied an affirmance of the right to proceed to the completion of the drainage work then in progress, and imposed a corresponding duty upon the city to collect and apply all drainage assessments to the payment of warrants, was neither justified nor excused by anything contained in the amendment; the authority to draw the warrants, payable out of drainage taxes alone, following the prohibition of increasing her indebtedness, gave point and emphasis to the latter; the supposed necessary implication, of an affirmance of the right of the city to proceed to the completion of the drainage work which was then in progress, is overborne by the fact that such work was then being conducted not by the city, but by the Canal Company and Van Norden, the city having no connection with it at all, until after its purchase in 1876, about two years and a half after the amendment was proposed.

31. That the court was mistaken in declaring that the question of prescription was the only one remaining, after having disposed of those mentioned, it having left unnoticed the plea of *res judicata*, set up in the answer; that the prescriptions were that of five years established by article 3540 of the Revised Civil Code of Louisiana, applicable to all effects negotiable or transferrable by endorsement or delivery; that of ten years established by article 3544 of the Revised Civil Code, applying to all personal actions, of any character whatsoever; that of ten years established by article 3547 of the Revised Civil Code, applying to all judgments.

That all these pleas of prescription were overruled by the court, on the single ground that the act of sale created a trust, under which the city undertook, as trustee, to collect and apply the drainage assessments to the payment of the warrants, a ground wholly untenable in Louisiana law, under which, by article 3530 of the Revised Civil Code, to enable a debtor to claim the prescription which operates as a release from debt, it is not necessary that he produce any title, or hold in good faith, the neglect of the creditor alone operating a prescription in such case, and under article 3550, that good faith is not required on the part of a person pleading this prescription; that these two articles, and that, barring all personal actions by the lapse of ten years, would apply to that part of complainant's bill which sought to hold defendant responsible for its noncollection of assessments due on private property; that the prescription of ten years, by which judgments are extinguished, established by article 3547 of the Revised Civil Code, would have direct application to judgments for

drainage taxes against the city herself; that as to these judgments she was not a trustee, but a debtor; that she was charged with no duty of saving them from prescription by suits for their revival, as, in any event, it was legally impossible for her, as plaintiff, to institute a suit against herself, as defendant, for their revival, while article 3547 left with complainant, and those similarly situated, the power, by timely suits for reviving the same, to save such judgments from extinguishment by prescription, the said article allowing any one interested in a judgment to bring a suit for its revival.

32. That besides the numerous defenses set up in the defendant's answer, only three of which are noticed in the opinion of the Court of Appeals, namely, that the drainage plan of the Canal Company was fatally defective, and could never furnish the basis for a successful drainage system, that the streets, public squares, etc., were not liable to assessment, and the plea of prescription; defendant pleaded the defense of *res judicata*, based upon the decree of the Circuit Court, and of this Honorable Court, in the case of Peake vs. The City of New Orleans; that if this plea was well founded, it would have extended the whole length of plaintiff's bill, and would have completely barred all the relief it sought; that the plea was based upon the fact that in the said case of Peake, James Jackson appeared, by intervening bill, as the holder of five purchase warrants identical in character with those sued upon by the complainant, namely, part of those given in payment of the price of the city's purchase of dredgeboats, etc., from the Canal Company and Van Norden; that the decree in the Peake case was a dismissal of complainant's bill, and of all intervening bills; that the decree upon the warrants sued on by Jackson was decisive of the status of the whole series of purchase warrants.

That this plea of *res judicata* was not mentioned by the court in its opinion, on account of which it may be said that it was not considered, and if so, defendant has had no hearing upon this branch of its case.

33. That the court was grossly in error in decreeing that the city was the absolute debtor of the drainage warrants sued upon; that all the bill sought to do was to obtain an accounting of the drainage taxes; that in no event were the drainage warrants sued upon to be considered unconditional obligations of the city until it was shown that all of the taxes had been lost, misappropriated or misapplied by the city, even if then, which is denied.

34. That in the Circuit Court of Appeals, as part of its petition for a rehearing, defendant filed an assignment of errors for the purposes thereof; that it was in words and figures as follows, to-wit:

First. That this Honorable Court, the United States Circuit Court of Appeals for the Fifth Circuit, is and was without jurisdiction to hear and determine this cause; that the case involves the construc-

tion and application of the constitution of the United States, especially section 10 of article 1, and also the 14th amendment thereof, prohibiting all legislation impairing the obligation of contracts, as is shown by the averment of complainant contained in the twenty-fourth paragraph of his bill.

That, independent of the said averment, this case is one which involves the construction or application of the constitution of the United States.

That in this case certain laws of the State of Louisiana are claimed to be in contravention of the constitution of the United States, to-wit: that by the said twenty-fourth paragraph of complainant's bill it is averred that the act of the general assembly of the State of Louisiana, No. 48, of the year 1877, excluding certain lands from all liability for drainage taxes and cancelling and annulling all judgments for the drainage of said lands, and the legal proceedings pending therefor, and the act of the general assembly of the State of Louisiana, No. 67, of the year 1877, declaring that no judgment for drainage taxes should be collected until the property had been benefited to an extent equal to the drainage taxes imposed, and section 42 of Act No. 20 of the general assembly of the State of Louisiana for the year 1882, by which all laws providing for the drainage of the City of New Orleans or portions thereof and the collection of drainage tax assessments are unconstitutional, null, and void because repugnant to the constitution of the United States, especially section 10 of article 1 and the 14th amendment of that constitution, prohibiting all state legislation impairing the obligation of contracts and protecting the rights of property.

Second. That the court erred in holding that all of the defenses set up in the answer had been ruled upon adversely by the Supreme Court in the case of John G. Warner vs. City of New Orleans, reported in 167 U. S., page 467.

Third. That the court erred in holding that the only fact in dispute between the parties is the question of responsibility for the alleged defects in the drainage plans; that the answer shows that there are other distinct issues made here which formed no part of the pleadings when the demurrer was heard, namely, the non-liability of the city for assessments against streets, public squares, and property of a like character; the effect of the amendment to the constitution of the State of Louisiana of 1874, and the plea of prescription and *res judicata*, that while the case of Peake vs. City of New Orleans was pleaded in the demurrer as *res judicata* of the present case, the showing on the demurrer in this respect was widely different from that made at present, namely, the record of the Peake case on the demurrer was not before the court, the plea could only be sustained by evidence, and hence the court could on the demurrer have no knowledge of its scope; in any event

the part of the case of Peake relied upon to sustain the plea of *res judicata* was the intervention of James Jackson and the plea therein, which could by no process whatever be brought to the notice of the court on the demurrer, in consequence of which the overruling of the demurrer cannot be considered as overruling the plea of *res judicata*.

Fourth. That the court erred in holding that the defects in the drainage plan were attributable to the fault of the city.

Fifth. That the court erred in holding that city was trustee as to the so-called assessments and judgments therefor against streets, squares, and public property of a like character.

Sixth. That the court erred in holding that the city, by drawing warrants against the drainage fund, was estopped to deny the existence and validity of the said assessments against public property, and if the court intended to hold, independent of the estoppel it declares, that the said assessments on streets, public squares, and property of a like character were valid, or were made by any authority of law, or had any binding effect against the city, it also erred in this regard; and if it reached the conclusion that any validity or binding force was given to said assessments by the judgments of homologation set out in the bill, it also erred.

Seventh. That the court erred in finding that the cases of the New Orleans Drainage Co., 11 An. 338; Marquez vs. City of New Orleans, 13 An. 319; Correjolles vs. Succession of Foucher, 26 An. 362; Barber Aphalt Paving Co. vs. Gogreve, 41 An. 259, were any authority on the question of the liability of public property to local assessment, or that the decision of those cases had any controlling or other influence on the issues involved here; likewise as to the case of McLean vs. City of Bloomington, 106 Ill. 209.

Eighth. That the court erred in holding that the assessments on said public property constituted a lawful debt of the city, which must be discharged by the exercise of the power of taxation.

Ninth. That the court erred in holding that the constitutional amendment of 1874 was not a complete defense to this suit; that while the said amendment permitted the issue of drainage warrants, the same, by the express terms of the amendment as to their payment, were restricted to drainage taxes alone, the same amendment allowing this mode of payment, "and not otherwise." This was an express denial of any power in the city, by any process whatever, to become the absolute debtor of the said warrants; and in any event the proviso of the amendment as regards the drainage warrants extended no farther than to those issued under Act No. 30, of 1871, and by no interpretation could be held to include warrants issued under the subsequent Act No. 16, of 1876; that the said assessments against public property were not confirmed by Act No. 30, of 1871, such confirmation as may have been given by said act having reference ex-

clusively to assessments against private property; that the authority to draw drainage warrants allowed by the amendment does not imply, as is declared by the court, an affirmance either of the validity of the assessments against streets and other public property or of the right of the city to proceed to the completion of drainage work then in progress, the said work at the time of the adoption of the amendment being exclusively in the hands of Van Norden, transferee of the Mississippi & Mexican Gulf Ship Canal Company, to the doing of which the city had no relation whatever, and to which it was a perfect stranger until its purchase under the act of 1876, some two years and a half after the amendment was adopted; that the city was absolutely without power to increase her debt by the purchase of 1876, or by any of the consequences thereof, and the effect of the constitutional prohibition could not be avoided by an error of law or otherwise.

Tenth. That the court erred in overruling or refusing to maintain the plea of prescription as to the assessments against public property and the judgments homologating the same; that as to these the city was not a trustee, but at most, under complainant's contention, a mere debtor, and even this is distinctly denied by defendant; that whether or not the said assessments and judgments are prescribed is to be determined by the law of prescription in the state of Louisiana; that the statutes of limitations of the several states and the interpretation given them by the highest court of the state in question are binding as rules of decision in the federal courts; that the laws of prescription of the State of the Louisiana and their construction given by the Supreme Court of this state, so far as they operate as a release from debt, depend for their appplication solely upon the lapse of time required; that good faith or bad faith, trusteeship, or other like matters are not considered. The mere passing of the time of the statute without further condition constitutes a complete defense; hence, even if the city, as erroneously held by your Honors, was a trustee, the plea of prescription as against the said assessments against public property and the judgments therefor should have been maintained; that the case of Insurance Company vs. Pike, 32 An. 483, is wholly inapplicable to this case, as concerns the said assessments against public property and the judgments therefor; that the city has not averred in its answer that it has constantly endeavored by suits and otherwise to collect these assessments, but, on the contrary, the answer expressly denies that they had or ever had any validity or binding force; that the averments of the collection and accounting for taxes set up in the answer are limited in terms to the assessments against private property; therefore the conclusion of the court that the city by its efforts to collect has affirmed the trust as to the assessment against herself is

error; that the city does not plead her own neglect to have kept the judgments against herself alive by bringing suits for their revival; that as a matter of fact she could not have done so, it being in law inconceivable that she as a plaintiff could bring a suit against herself as a defendant, to revive a judgment against herself; that this would not leave complainant without a remedy, as by article 3547 of the Revised Civil Code any person interested in a judgment may bring a suit for its revival, so that it is the warrant-holders, and not the city who have allowed the said judgments to prescribe. The city was absolutely without power to revive them, while the warrant-holders were free to have done so. In consequence of this and other considerations the cases of the Succession of Farmer, 32 An. 1037; McKnight vs. Calhoun, 36 An. 408, to the effect that the prescription of debts due by a succesion to its administrator and *vice versa* is suspended, while the administration continues, are without application here; that whether or not the assessments as originally made, are subject to prescription, and defendant insists that they are, they have, by the averment of complainant, passed into judgments, and by merger have lost their original character; that the judgments are subject to prescription is apparent from the textual provisions of article 3547, Revised Civil Code, the case of Reed vs. His Creditors, 39 An. 115, citing State vs. Jackson, 34 An. 178, and Davidson vs. Lindop, 36 An. 767, construing, as they do, the particular provisions of special statutes presenting no feature in common with those presented here, the statutes interpreted by those cases, differing *in toto* from those involved here, expressly provide that the taxes levied thereunder shall not be subject to prescription, and hence furnish no authority upon the question of prescription here at issue."

Eleventh. That the court erred in holding that the only remaining consideration which required its consideration, after having disposed of those preceding, was that of prescription; that defendant, besides the other defenses, had pleaded *res adjudicata*, based upon the opinion and decree of the United States Supreme Court and of the Circuit Court for the Fifth Circuit and Eastern District of Louisiana, in the case of James W. Peake vs. City of New Orleans, No. 11,614 of the docket of the latter. The opinion of the Supreme Court in such cause is found in 139 U. S. Reports, page 323. (See Record, pages 22 and 23.) The opinion of the court did not dispose of this defense; it was not considered. It should have been maintained as a bar and defense to this suit.

Twelfth. That the court erred in holding that the city should not be allowed, in any event, the amount of its bond issue, described in the answer as a credit in her favor, on any amount which she might hereafter be decreed to owe; that while it has been held by the Supreme Court that the bond issue could not be so treated, the opin-

ion of the Supreme Court was based upon the question submitted for its consideration in this respect, which was made up from the record of the case as it then stood, namely, on an answer and a demurrer; the record at that time necessarily did not and could not make the showing of facts which is now before the court, namely, that Van Norden, the vendor of the city, received, either himself personally or through his employees, assignees, or transferees, the entire issue of the bonds, and hence could not plead ignorance of the fact that the drainage fund had been augmented to the extent of the issue of bonds; that this would remove the element of ignorance on his part necessary to constitute an estoppel as against the city; that while the finding of the Supreme Court that the bond issue could not be treated as a defense was on the demurrer, it does not extend to the exclusion of such defense under the evidence now disclosed by the record; the bill does not even aver that Van Norden was ignorant of the issue of bonds, but that he did not understand that its legal consequence, was a diminution of the outstanding drainage fund; and that he did not anticipate at the time of the purchase that the city would make such claim. This, at most, would be an error of law, a lack of correct judgment as to the legal consequences of a certain act, against which the laws of Louisiana does not relieve.

It should be noted also that what the Supreme Court said was based only upon the status of the bond issue, at shown by your Honors' certificate, and not by the averments of the bill, the former being much narrower than the latter.

Thirteenth. That in Peake vs. New Orleans, 139 U. S. 342, the Supreme Court held that the city had the right to abandon the work of drainage—that such an abandonment was no cause of liability to warrant-holders; that while the opinion was with reference to work or construction warrants, it is equally applicable to the purchase warrants sued on herein, and that the city should be exonerated from any liability based on the ground of the abandonment of said work, and in failing to give effect to this ground of the defense, the court erred.

Fourteenth. That the court erred in holding that the City of New Orleans was a debtor of John G. Warner, the complainant, in the sum of six thousand dollars, with eight per cent. interest from January 6th, 1876, or in any sum whatever.

Fifteenth. That the court erred in decreeing that the drainage assessments, including those against the defendant as assessee of streets, squares and public places, as well as those against the owners of private property, constituted a trust fund in the hands of the city for the purpose of paying the claims of complainant and other holders of the same class of warrants issued under the act of

sale from Warren Van Norden, transferee, to said city, under the authority of Act 16 of the legislature of the State of Louisiana, approved February 24th, 1876.

Sixteenth. That the court erred in holding that the city in any mode, should be held to account for assessments of drainage taxes against streets, public squares, public places, or other property of a like character; that the court erred in decreeing that no offset should be allowed the city, in any event, for bonds issued in exchange for drainage warrants under the act of 1872.

Seventeenth. That the court erred in decreeing that complainant and those who had established their claims under the fourth clause of the decree would be entitled to an absolute decree against the defendant under any conditions.

Eighteenth. That the court erred in failing to give due effect to the appointment of a receiver for drainage taxes. This suit, if otherwise well founded, which is denied, should be directed against said receiver, and not against the defendant.

Nineteenth. That the court erred in not holding that the acts of the general assembly of the State of Louisiana, Nos. 48 and 67, of 1877, and section 40 of Act No. 20, of 1882, were full and complete authority and justification of the City of New Orleans for having abandoned the work of drainage, and also a full defense to the liability asserted in this suit against her for any non-collection of drainage taxes.

That this assignment of errors, petitioner prays this court to take and consider as its assignment of errors, along with errors set out in this petition, as an assignment of errors for the purposes of this petition.

35. The court was also in error in allowing interest at eight per cent. per annum upon the warrants sued upon from June 6th, 1876, making over twenty-two years, which would amount now to over one hundred and seventy-six per cent.; that neither act No. 16 of 1876, nor the contract of sale thereunder, provides for the payment of interest, and the stipulation for the payment of interest contained in the warrants was without authority of law, the administrators of accounts and finance having no power to exceed the statute, and the contract, under which the warrants were issued.

36. That whether or not the said plea of *res adjudicata* was well founded, is to be determined by the scope and effect of the finding and decision of this court in the said case of Peake vs. New Orleans; that the proper construction of your Honor's decision in that case is a subject peculiarly within the supervisory power of this court; and that such power should be here exercised in the interest of jurisprudence and uniformity of decision, and as well also in furtherance of justice.

37. That the contract upon which is founded the liability sought to be established against the city, was grossly unfair and inequitable in reference to the latter; that the dredgeboats, derricks and other property, sold to the city in 1876 for three hundred thousand dollars, payable in drainage warrants, had been acquired by Van Norden from the Canal Company in 1872 for fifty thousand dollars; that during the intervening time, the boats and other drainage paraphernalia had been in almost constant use, and, from the averments of the bill as to the number of canals dug and levees built, it is evident that they were worked to their utmost capacity; that this in no sense tended to increase their value, as placed upon them by Van Norden and the Canal Company in the purchase from the latter by the former in 1872; that this, notwithstanding, the same property was sold to the city by Van Norden in 1876 for an amount in drainage warrants exceeding by five times the sum which he had paid for them nearly four years previously.

Your petitioner thus respectfully submits, that the questions involved in the determination of the controversy in this suit, are of such gravity and importance, and their treatment by the Court of Appeals was such, as justifies petitioner, in the furtherance of justice, to invoke the power of this court, that they may be authoritatively and finally adjudged upon, after a full presentation of the merits.

Wherefore, petitioner respectfully prays, that a writ of *certiorari* may be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding the said court to certify and send to this court, on a day certain, to be therein designated, a full and complete transcript of the record, and all the proceedings of the said Circuit Court of Appeals, in said case, therein entitled John G. Warner vs. City of New Orleans, No. 691, to the end that said case may be reviewed and determined by this court, as provided by section 6 of the act of Congress entitled "An Act to establish Circuit Courts of Appeals, and to define and regulate, in certain cases, the jurisdiction of the Courts of the United States, and for other purposes," approved March 3d, 1891, or that your petitioner may have such other or further relief or remedy in the premises as to this court may seem appropriate and in conformity with the said act, and that the said decree of the said Circuit Court of Appeals in said suit, and every part thereof, may be reversed by this Honorable Court.

And your petitioner will ever pray, etc.

UNITED STATES OF AMERICA,
STATE OF LOUISIANA,
CITY OF NEW ORLEANS.

Walter C. Flower, being duly sworn, deposes and says: That he is the Mayor of the City of New Orleans, defendant in the suit of John G. Warner vs. the City of New Orleans, No. 691 of the docket of the United States Circuit Court of Appeals for the Fifth Circuit; that he has read the forgoing petition, and the facts therein stated are true to the best of his knowledge and belief.

UNITED STATES OF AMERICA,
STATE OF LOUISIANA.
CITY OF NEW ORLEANS.

Samuel L. Gilmore, being duly sworn, deposes and says: That he is City Attorney of the City of New Orleans; that as such he had personal charge for the said city of the case in the foregoing petition mentioned, in the United States Circuit Court of Appeals for the Fifth Circuit; that he has read the said petition, by him subscribed, and the facts therein stated are true, to the best of his knowledge and belief.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

THE CITY OF NEW ORLEANS, A MUNICIPAL CORPORATION, PETITIONER,

vs.

JOHN G. WARNER, RESPONDENT.

Addressing itself to the supervisory power of this court, petitioner relies more upon the equities of its case, than upon the legal grounds of attack against the decree of the court below.

Impressed with the conviction that if the hard and oppressive character of the contract upon which complainant bases his rights, is once perceived by your Honors, there will be no doubt as to your action, petitioner deems it not unfitting, at the outset, to ask the attention of the court to certain features of the present case, which potently appeal to the fair minded, and strikingly address themselves to the sense of right.

This suit is founded immediately, upon a contract by which, on June 7th, 1876, the Mexican Gulf Ship Canal Company, and W. Van Norden, transferee, conveyed to the City of New Orleans, certain dredgeboats, derricks, barges and other articles, tools and implements, constituting an outfit for drainage work; the price of this sale was three hundred thousand dollars, payable in drainage warrants (see record, page 97).

This same property had been bought by Van Norden from the Canal Company on November 22d, 1872, for the sum of fifty thousand dollars, paid by a release to that extent, of an indebtedness in a much larger amount, owing by the company to Van Norden (record, page 107).

To the ordinary mind, the conspicuous feature of a comparison of these two transactions, is the vast and gross disproportion, between the price for which Van Norden acquired the property, and that for which he sold it to the city; the latter being six times the former.

When there is further considered, the spirited description of the work of canal and levee building done with these very boats and other paraphernalia, from 1871, first, by the company, and then by Van Norden, until they were sold to the city in 1876, one is the more perplexed to understand this marvelous increase in value; unless everyday experience is disregarded and the promptings of common sense rejected, the mind is stunned with the monstrosity of the bargain; surely, a court of justice cannot rise to a higher discharge of duty, than the subjection of such a contract to an ordeal of the closest scrutiny.

It may be replied that by the city's act of purchase, she acquired not only the dredgeboats and like property, but also the rights, privileges and franchises of the canal company, conferred by Act No. 30 of 1876.

But a reference to the statute will show, that the franchises and privileges of the canal company were to dig canals and build levees, for the prices allowed in the act; the purchase of these franchises by the city was less an acquisition, than it was the assumption of an obligation to do the drainage work, and collect the cost thereof from the property liable to assessment under the statute; all this for the benefit of Van Norden. It appears by the appraisement (record, page 95) that the value of the dredgeboats and other tangible property was fixed by the city's appraiser, at one hundred and fifty-three thousand seven hundred and fifty dollars ($153,750); the appraisement contained a reference to the damages claimed by the canal company for delays, upon which, however, no value was placed. It would be interesting to know the basis of the difference between $153,750, the value of the dredgeboats and other property, and the $300,000, which was eventually paid by the city as the price. The claim for damages in no respect entered into this sum, as the subject is not mentioned at all in the act of sale, which is only a conveyance of the franchises of the company and of the tangible property mentioned. The first section of the act of 1876, authorized the city to make the purchase and settlement of the canal company of any rights, franchises or privileges, arising out of the act of 1871; also, the purchase of all tools, implements, machines, boats and apparatus, belonging to the company or its transferee, used for work authorized by the act of 1871; the second section of the act directs an appraisement to be made of the rights and things to be purchased and settled, if the council should deem it advisable to make the purchase. It is seen that the appraisement of the property reached an infinitesimal amount in excess of about one-half of the amount paid, and that the franchises of the company, which, it may be here remarked, had already been sold by the company to Van Norden on November 22, 1872, were not appraised at all.

A possible explanation of this may be found in the assumption that they were considered of no valne, or not susceptible of appraisement at all; the mention in the act of purchase of the payment of twenty thousand dollars ($20,000), in settlement of an amount claimed to have been diverted by the city, furnishes no aid to complainant in this view of his contract.

The significance of the facts here averted to is, that the superiority which your Honors have held to be enjoyed by the purchase warrants over those issued for work, is found in the fact that the former were issued as the price of the sale of property; the fact here shown by the record is, that only a small amount over the one-half of the warrants were issued for such price, or at most for the kind of price that was meant by the court, when it made the distinction between the two classes of warrants, and whether or not complainant's warrants are referable to the number which were given for the price of the boats, or to the residue of the total price, is a question at any time difficult, but in the present state of the record, impossible of solution.

Results harshly affecting hundreds of thousands of people are involved in the decree of the Court of Appeals; it is respectfully suggested that for this reason, if for no other, petitioner's case should receive the most deliberate and painstaking consideration. and that the door of inquiry should be left open by the highest tribunal from which justice can be obtained.

The decree in this case has gone further than the relief prayed for by the complainant; it has condemned the city as the absolute debtor of the warrants sued upon, amounting to six thousand dollars, with eight per cent. per annum interest from June 6th, 1876, more than twenty-two years, which would make in all 176 per cent., which, if applied to the whole three hundred thousand dollars of warrants, would involve a liability of huge proportions; the complainant nowhere asks that the city be deereed the debtor of the warrants at all, but only that it might be made to account for such taxes as it should account for, and the sum thereof, when ascertained, applied to the payment of the warrants; it will be noted that the statute of 1876, under which the contract was made and the warrants issued, provided nothing as to the payment of interest, nor did the act of sale, passed in pursuance thereof; it is true that the former provided that the warrants "shall be issued in the same form and manner as those heretofore issued to the transferee of said company under Act No. 30, of the acts of 1871, for work done;" and that the latter act provides, that the warrants, after being issued, if not paid when presented, shall bear interest at eight per cent. per annum until paid, but this clause of the act of 1871 in no way enters into the "form and manner"

of the issue of the warrants, which was all that was intended in common between the warrants issued for work done, and those for the price of the sale.

In a cause depending upon complicated issues of law and fact, and fraught with consequences so grave as the instant case, every matter of defense should be examined and weighed with the greatest care; it will be found, however, that the opinion of the Court of Appeals contains no syllable of reference to a plea of defendant which, if well made, would save it from liability; the plea is that of *res adjudicata*, extending to every form of relief sought by the bill; this plea, based upon the finding of this Honorable Court in Peake vs. New Orleans, No. 852 of the October term of 1890, and reported in the 139th United States, page 342, is one phase of the present application which, it is deemed, specially addresses itself to the favorable consideration of the court, interested as it is in the correct construction and proper application of its opinions, and in that uniformity which is a paramount necessity in jurisprudence.

The opinion of the court *a qua*, as is endeavored to be shown further along, has, as its fundamental thought, certain principles which this court is supposed to have announced in Warner vs. New Orleans, 167 U. S. 467; it is respectfully urged that a comparison of the opinion in that case with that of the Court of Appeals in the present case, will reveal that the former has been wholly misconstrued and misapplied.

Addressing itself to the highest source of relief, and basing its prayer upon such considerations as, it is hoped, may control your Honors' judgment, petitioner, whose case has never been before this tribunal in such form as that the justice of its position could be adequately perceived, craves attention to its complaint against what is believed to be an unjust judgment of the Court of Appeals.

In the allowance or refusal of writs of *certiorari*, this court is vested with, and has constantly exercised, a very extensive discretion; it is bound by no rules save those of conscience, and an enlightened and humane administration of justice; the writ is issued whenever in the view of the court, circumstances imperatively demand it, as, at common law, to correct excesses of jurisdiction and in furtherance of justice; *in re.* Chetwood, 165 U. S. 461; it has been issued to avoid conflict of decision between two, or more courts of appeal, or between the courts of appeal and the courts of a state; Forsyth vs. Hammond, 166 U. S. 515; it may issue where a circuit court of appeals in one circuit has given a different decision from a circuit court of appeals in another circuit, under the same conditions; the act of congress makes provision for such supervision of the inferior federal courts by the Supreme Court, as will tend to avert diversity of judgment and guard against any inadvertance of conclusion, in controversies involv-

ing weighty and serious matters; this, in the interest of jurisprudence and uniformity of decision; authorities: *in re.* Woods, 143 U. S. 206; Law Ow Bew vs. United States, 144 U. S. 58; American Construction Company vs. Jacksonville Roadway, 148 U. S. 383.

The writ of *certiorari* has been allowed in a case where a decision of the Supreme Court has been misconstrued, or misapplied, by a circuit court; Law Ow Bew, 141 U. S. 587; same case, 144 U. S. 58.

The question at what stage of the proceeding, and under what circumstances, the case shall be required by *certiorari* to be sent up for review, is left to the discretion of the court, as the exigencies of each case may require; American Construction Company vs. Jacksonville Railway, 148 U. S. 385; the writ may issue after a decree of the district or circuit courts, dismissing a libel, has been reversed, and the case remanded to the circuit court to assess the damage, the final decree of that court for a specific sum, and a second appeal to the Court of Appeals; under these conditions, the writ brought up the whole case for review; Panama Railroad vs. Napier Shipping Company, 136 U. S. 280.

It has been said that that portion of section 6 of the act of 1891, giving the remedy of *certiorari*, applied to every case in which, but for it the decision of the Court of Appeals would be final, and gives the Supreme Court the same authority over the case as it would have on appeal or writ of error; that the power was not affected by the condition of the case as it existed in the Court of Appeals; that it might be exercised before or after any decision of that court and irrespective of any ruling or determination therein; Forsyth vs. Hammond, 166 U. S. 506-512; so long as the transcript of the record of the Circuit Court, is in the Circuit Court of Appeals, the fact that a mandate from it has gone down to the Circuit Court, does not affect the right of the Supreme Court to issue a writ of *certiorari* to the Court of Appeals to bring up the record; the writ is in time if applied for at the next term and within a year after the original decree; "The Conquerer," 166 U. S. 110.

The effect of these authorities may be summarized in the proposition, that the court may exercise its supervisory jurisdiction to correct manifest errors, to prevent a denial of justice, or to revise decrees, whenever, in its discretion, it is deemed proper to do so, in the interest of justice; and this may be done at whatever stage the case may have reached in the Court of Appeals, either before or after the decision, at any time during one year from the decree, provided this be not beyond the next ensuing term of the Supreme Court.

The principal grounds upon which this application is based are that the Court of Appeals has misconstrued and misapplied a decision of this court, Warner vs. New Orleans, 167 U. S. 347; that it has failed to give not only the proper but any construction and effect at all, to

the opinion of your Honors in Peake vs. New Orleans, 139 U. S. 342, in its failure to sustain, or even mention in its opinion, the plea of *res adjudicata*, based upon the decree in that case; subordinate to these considerations there are others, some springing therefrom, and others independent and substantive grounds of relief.

The case, in its public aspect, is a subject of large and important interest to the inhabitants of one of the largest cities of the Union, and its final determination is awaited with anxiety by many thousands of persons who will be subject to its effect; it is hoped that this court will see the way clear for the exercise of its supervisory jurisdiction invoked by defendant. The petitioner is the more earnest in this hope by its knowledge, that the final determination by this court of a controversy which has been pending for many years, will be respected and cheerfully acquiesced in, by reason of the respect for, and confidence reposed in this tribunal by all good citizens.

The grounds upon which the petitioner has main reliance are that the decision of this court in 167 U. S. has been erroneously construed by the Court of Appeals, as decisive of many important issues in the present case; that the defense of *res adjudicata* pleaded by defendant, is not mentioned in the opinion of the court, and that the city should not be cast until all its defenses have been considered and overruled; subordinately, that the conclusions of the Court of Appeals, as to the liability of defendant, are totally unfounded; for instance, no effect whatever has been given to the constitutional amendment of 1874, or, to be more accurate, it has been given an effect, the reverse of what it was designed to have, and in violation of its very terms; that the four pleas of prescription, each applying to a different phase of the controversy and governed by considerations widely different, have been disposed of by the lower court in bulk, by the single finding that the city, as a trustee, is incompetent to raise them.

The slightest examination of the finding of this court in Warner vs. New Orleans, 167 U. S. 467, discloses what is as plain as anything can be made to appear, namely, that the court had before it two questions, and no others, namely: Was the city estopped to plead its bond issue in discharge of its asserted liability herein, and second: Whether or not the present case was covered by that of Peake in 139 U. S.?

It is evident by a glance at the opinion of the Court of Appeals, though not expressly so declared, that the court conceived itself bound against defendant on the whole case, by what was said when it was before this court on the certified questions; the opening sentence of the opinion is that "As to nearly all of these defenses, we might well rest our decision in this case on the opinion of the Supreme Court, expressed in its answer to the certified questions;" as a matter of fact, no single defense set up by the answer, save that based upon the bond issue, had made its appearance in the case, as a matter for con-

sideration, until set up in the answer; it is true that in the demurrer of defendant, the case of Peake was pleaded as *res adjudicata;* but considering that this defense was not properly set up in the demurrer, for the reason that it required evidence to support it, it is seen at once that any claim that it was ever considered at all, is gratuitous; it is, therefore, perfectly correct to say that instead of the court being able, if it saw fit, to dispose of all of the defense which appear in the answer, by resting its opinion upon what was said by this court in answer to the certified question, the fact is, that the defense based upon the bond issue was the only one which had ever been submitted to, and received consideration.

It may be inquired, to what purpose the bond issue is set up in the answer as a discharge from liability, after it having been held by your Honors that it could not be considered as a defense; but this is readily explained; the question submitted on this branch of the case was, whether *under the case stated by the bill*, the city was estopped, to set up the issue of its bonds as a discharge of liability; and, in deciding this question, your Honors said (167 U. S. 475), that, in order to a full understanding of the question to be answered, a review of the facts was essential; and that, for the facts, you would look simply to the statement prepared by the Court of Appeals, and not to the bill and exhibits, copies of which were ordered by the Court of Appeals to be sent you; it will be noted that the conditions upon which the question was to be decided, were specified by the latter, as the facts stated in the bill, while this court declined to examine the bill for this purpose, but confined itself to the statement of the Court of Appeals; neither by the bill, nor by the statement, did it appear that Van Norden himself, or parties to whom he had transferred drainage warrants, or his employees, received the whole of the bond issue in payment of drainage warrants; and that, hence, he was the recipient of all the benefits thereunder; it appeared from the bill that, at the time the bonds were exchanged for warrants, the entire drainage fund outstanding and uncollected was, in round numbers, $1,400,000, and that, by issuing these bonds for an amount in excess of $1,600,000, which were received by the warrant holders at 90 cents on the dollar, that the city had at least put into the fund the whole of it that could have been realized, if every dollar had been collected and paid over to Van Norden; your Honors have said in the Peake case, 139 United States, page 359, that, when the city thus paid this amount into the drainage fund, that as she had no power to make donations, the payment must, in equity, be treated as a discharge of obligations, if there were any; in answer to the certified questions submitted to this Court, it found a difference between the work or construction warrants involved in the Peake case, and the purchase warrants involved in the present case, and held that the city

could not be permitted to destroy a fund against which she had drawn her warrants in payment of the purchase price of property, which would result from her pleading that she was no longer indebted to the fund by reason of said payment made before the purchase warrants were issued; had the bonds been received by others than Van Norden, or those holding under him, the case would be quite different from what it is in fact, namely: that Van Norden himself, and other holders of warrants received from him, were the beneficiaries of the city's payment; it is clear that if the city be not allowed credit for the drainage warrants that were retired by her bonds, and at the same time be made responsible for the entire fund, as claimed by the bill, that the taxes have been increased by $1,600.00 over what they were ever contemplated to be, by the laws under which they were levied; if Van Norden, or, what is the same thing, persons who had acquired warrants from him, be permitted to receive the fruits of the city's bond issue, and at the same time hold the latter responsible for the balance of the original fund unpaid and uncollected, he would be left in the attitude of receiving, the bonds as a mere gratuity, and at the same time exacting from the city its full measure of asserted responsibility; if it be said that the city by drawing its purchase warrants against the fund, must be considered as affirming the existence of that fund, the answer is, that Van Norden knew precisely what the fund was; and if the city's asserted liability for assessment on streets, public squares and property of a like character were thus paid and discharged, and he was left with the assessment against private property alone to pay his warrants, it would be only a repayment to the city of less than one-half the amount of the bonds upon which it was liable and paid, and the proceeds of which went into the pockets of Van Norden himself.

Proceeding, however, the opinion which is marked by a frequent reliance on estoppels, goes on to say that the city's claim that she is not bound by the assessments and judgments against herself, as *quasi* owner of streets and other public places, on the ground that such assessments and judgments should be considered void *ab initio*, for the reason that public property is exempt from taxation, finds that the city, under the principles laid down by your Honors in answer to the certified questions, was estopped to deny their existence and validity, to the same extent that it is estopped from setting up its bond issue as a discharge of its general liability as trustee, with reference to the fund; the court, however, adds, that independent of estoppel, the authorities *seem* to affirm a liability under conditions surrounding the city in the present case; with regard to the estoppel, your Honors have said nothing as to how far the city was bound as to the particular assessments composing the fund; all that you have said is, that she could not impair that fund, whatever it might be, by an allowance of the

bond issue as a credit against it; nothing can be found in your opinion which declares that the assessments on streets and public squares are valid; it is difficult to understand the application in this regard, of the court's answer to the certified questions; the *seeming* affirmation of the city's liability given by the authorities brought in to support the theory of estoppel, to invite confidence, should have been reasonably supported, at least, by an asserted similarity between the statutes under consideration in the cases relied on, and those involved here; the acts of 1858, 1859 and 1861, bear intrinsic and conclusive evidence, that private property alone was intended to be assessed.

For instance, by section 7 of the act of 1858, directing how the boards shall proceed, they are directed to make a plan designating the limits of the section to be drained; the subdivisions of the property therein contained, and the names of the proprietors; after depositing this plan in the mortgage office, and advertising such fact, the commissioners are directed to apply by petition to one of the district courts of New Orleans for that part of the district lying within that parish, and after the observance of certain forms and delays, the court is to decree that each portion of property situated within the limits, should be subject to a first mortgage, lien and privilege; this clearly contemplates only such property as may be susceptible of mortgage or privilege, which would not include public property; should there be any doubt of this, it is cleared by the further provision of the section, that the drainage mortgage should take precedence over all other mortgages, liens and privileges whatsoever, whether tacit, conventional, legal or judicial; in what sense could these mortgages be understood, as applied to public property? That private property alone was intended to be assessed is declared by the precedence which is given to the drainage mortgage over the other kinds of mortgage named, which could only be applied to private property; for instance, a tacit mortgage is that which a wife enjoyed on the property of her husband prior to the adoption of the constitution of 1868; a conventional mortgage is one created by contract between one person and another; a legal mortgage is one which results from the registry of a judgment in favor of one person against another; public property is not susceptible of being affected by any of the mortgages named, and the kind of property to be affected by the drainage judgments is the same kind, and no other, than that which the several species of mortgage named could encumber, that is, property the title to which is vested in private persons.

By section 9, on non-payment of the assessment, judgment could be recovered for the same, and the land assessed be sold; and the board was authorized to purchase, hold and dispose of the same for the benefit of the district; this clearly shows that the kind of property out of which the taxes was to be collected was one which could be

acquired by a third party, or by the board itself, or, in other words, property which could be bought and sold by the owner; a seizure and sale of property by judicial process is only exercising *sub modo*, the right that the debtor himself would have to sell it; in the absence of an owner with power to dispose of the property, as where the title is in the public or all the people, there can be no seizure and sale for the collection of the tax; property out of commerce, not susceptible of alienation, was not in view by the framers of the act.

The only reference to streets, etc., in connection with the drainage scheme is found in section 8 of act 191 of 1859, which provides that the board shall have access to, and the right of copying, any plan or parts of plans of the city in the possession of the council, or any officer thereof, which is to be certified by such custodian to be a correct copy, the same to include streets, etc., or any portion or section thereof to be drained, according to the provisions of that act, or the act of 1858; this section purports to do nothing more, than to secure to the board copies of any city plans that might be needed in the discharge of their duties; the direction is that the plan shall include the streets of any portion or section which is to be drained; the direction that the copy shall include the streets or any part of the city to be drained, is not a declaration that the streets are to be assessed for drainage; it was merely to make sure that the board would obtain complete and intelligible plans of any part of the city they might wish, and that the streets were to be delineated thereon, in order to the better understanding of the plan; it would be strange that, after the voluminous provision of the act of 1858, which contains thirteen sections, covering something more than five pages, it should have thus far remained silent as to the liability of the streets for assessments, and that such liability should be fixed in three lines of the concluding section of the act of 1859; and then only by an inference which narrowly escapes being a conjectural; it is incredible that so large an item of revenue should be left to depend upon so frail a title; all presumptions would be against the purpose of making such property liable to assessment, to remove which would require language of unmistakable meaning; as plain as any fact can be made to appear, the section intended nothing more than to secure to the board the right to have copies of the plans so made that the streets would appear thereon; there is no room for supposing that the copies of the plans so furnished were to be the basis of the assessment; it was only for the use of the board for any purpose which it might serve, as, for instance, to show the boundaries by streets of the property to be assessed.

Act 57, of 1861, however, removes all doubt as to the nonliability of streets, etc., to assessments; it declares that the amount of the assessment fixed by the board to be paid yearly by the owner or

owners of the lands within the district, for the purpose of the act, shall be exhibited upon a tableau, upon which the property assessed shall be set forth, with the names of the owners, and, as if to emphasize the intention that only such property as was susceptible of ownership by a definite person was contemplated, it is further provided, that if the owners were unknown, the assessment rolls should state that they are unknown; a petition should be filed praying for an order that all persons whom it may concern show cause, in thirty days, why the roll should not be homologated, and that after the publication of said notice, on motion of counsel for the board, the court should homologate the rolls, which should be a judgment against the property assessed, and *the owners thereof*, on which *execution might issue*, as on judgments rendered *in the ordinary mode of the proceeding*; this again emphasizes the fact that the only property entitled to be reached by the assessments was property *susceptible of alienation*, and which was *liable to seizure by the sheriff*, processes altogether unknown and impossible as regards streets, squares, etc.

The act of 1858, in all of its recitals, negatives the idea that public property was in contemplation; it directs that all the subdivisions of property, with the name of the owners, shall appear by the plan; a street has no subdivisions, and the city is not the owner, but is only an administrator of public property for the benefit of the people; significance is given to the fact that private property alone was intended to be assessed, by the requirement, that where the owner is unknown, that fact should be so stated; private ownership is always found in association with the property intended to be charged; the further provision that the recorder of mortgages should report the drainage lien, privilege and mortgage, as taking precedence over all other mortgages, legal, conventional and judicial, affirms that the drainage encumbrance should extend only to such property as is susceptible of the mortgages described; and public property is not within this category; the act of 1861, providing that the drainage tax should be collected on execution as in ordinary cases, would necessarily limit the enforcement of the tax to such property as was liable to seizure and sale by the sheriff; which, of course, would not comprehend the streets, squares and property of a like character.

Streets and public squares are "public things," and are for the common use of the city. Revised Civil Code, article 454.

The drainage taxes are local assessments, which are a peculiar species of taxation; they differ from general taxes in the respect that the former are levied without any assurance that the taxpayer will be benefited, while the latter are made upon the assumption that a portion of the community is to be peculiarly benefited in the enhancement of the value of property, specially situated as regards the contemplated improvement.

Cooley on Taxation, p. 606, et seq.

Desty on Taxation, Sec. 59, pp. 281-285.

Where there is no peculiar benefit there is no liability for the tax.

Desty on Taxation, p. 285.

State vs. Clinton, 26th An., p. 561.

That the statutes of 1858, 1859 and 1861 did not have in contemplation public property, such as streets, squares, etc., as subjects of assessments, is manifest from the terms of the acts themselves; the assessments were to be made against the property and the owners thereof; the city is not the owner of the streets and squares; they belong in common to all the inhabitants of the municipality. Revised Civil Code, article 458; the city has no relation to them except as an administrator, with the right to regulate their use.

14th La. An. 842, 82 ;

12th La. An. 747;

32d La. An. 915:

37th La. An. 67.

The city not being the owner of the property in question, in no event could be held liable for the tax; the statutes did not intend that any assessments should be made against streets or public squares, and the commissioners in so doing were in excess of their authority, as the tax was to be levied against property and its owners; the title of ownership was necessary in order to make any person liable to the charge; property, the fee of which was not in any person, natural or artificial, known or unknown, in which category streets and public squares would be included, was evidently not in contemplation as subject to assessment, for the terms of the statute, fixing the liability upon the *property and the owner*, in the order named, may reasonably be deemed to have intended, that for the collection of the tax recourse should be restricted first to the property, and afterwards to the owner, in the event that the assessment was not collected in full out of the former; the justification of the tax being the supposed benefit conferred upon the property by the increase of its value, the suggestion naturally arises that the collection of the tax is primarily confined to the property which is intended to be improved; it *could* be, for such cases are disclosed here by the evidence, that the entire property might be taken for the tax, and leave a balance unpaid, that is to say, the owner would have lost his property altogether, and still be in debt; on the other hand, the sale of the property, and such cases are also disclosed by the record, might pay the tax many times over, in which event there would be no necessity of recourse against the owner; a local assessment being in its essence a tax on land, and not against persons, is naturally payable first from the property itself, and the personal liability, if there be any, should be asserted only for any balance re-

maining unpaid after the property has been exhausted; these considerations tend conclusively to the result that there is no personal liability, or any right to take execution against the owner, until the property is first exhausted, and then only for unpaid balance.

Applying this to the asserted liability of the city as a debtor for the taxes on streets and public squares, how would the city stand in the issuance of an execution for the sale of its streets? What would be the effect of a suit for a mandamus to compel the city to pursue such a course? How would result the efforts of the warrant holders themselves, if they were in a position so to do, to sell the streets and public squares for the payment of the taxes? Going further, imagine a number of drainage tax judgments, and every street in the city named upon the assessment rolls put under seizure by the sheriff, and the farce of its advertisement and adjudication to a purchaser persisted in, what kind of a title would such purchaser receive, and what manner of possession would the sheriff give under his adjudication?

Referring, again, to the rule that local assessments are upheld on the ground that they confer a peculiar and special benefit upon certain property, in which other property does not participate, as regards public streets and public squares, of which the entire people have the free use and enjoyment, what special benefit would they receive from the drainage apart from other property?

They are not in commerce, and have no value which can be measured in money; they belong to no one person, not even to the city herself, but are the property of every inhabitant. See Neenan vs. Smith, 50th Mo. 525, 528.

Hartford vs. West Middle States, 45th Conn. 462.

The city in no event could be held as a trustee of the assessments and judgments against herself; as to these she was a debtor and not a trustee; besides which, it will be seen that the court has dealt with the city's defense as to these assessments, as though it was based simply upon the exemption from taxation of public property, in the general sense.

It may be premised that the defense set up is not simply that the public property in question is exempt from taxation, but also that it was not intended by the act of 1858 to be assessed for drainage taxes; your Honors will observe that this part of the city's defense, on this part of the case, is not noticed in the opinion.

The claim that the city is a trustee, is based upon the provisions of Act No. 30, of 1871, and more particularly upon those of section 9 of that act.

Defendant insists that by that statute, it is not made a trustee of the assessments against public property; that no such intention is expressed or implied in any language that it contains; on the contrary, from the circumstance that it is made a trustee as to assessments

against private property, and no mention is made of those against public property, its trusteeship as to the latter is completely negatived; and, further, that the failure to mention assessments against streets, etc., either expressly or by inference, may be evidence that they were deemed invalid by the legislature; on the other hand, it is clear, that the assessments turned over to the city were those against private owners alone; this is shown by the duties imposed upon the city; the act says, section 9, page 78, that the Board of Administrators "be and are hereby authorized and directed to collect from the *holders of the property* within said districts, the balance due on the assessments, as shown by the books of the first, second and third drainage districts, under the acts of March 15th, 1858, and March 17th, 1859, and the several acts supplementary and amendatory thereto, which *said assessments* are hereby confirmed and made exigible." Italics are ours.

The same section says, page 77, that the Board of Drainage Commissioners "shall transfer to the Board of Administrators of New Orleans, all moneys, assessments, and claims for drainage in their hands or under their control, * * * a true statement of the claims of said Drainage Commissioners against the city, to be adjudicated and settled out of any money *collected* by the city."

The claim that the assessments against the city were included in the assessments placed under the control of the board is seen to be entirely without force, when, reading further, it is ascertained, what the city was directed to do with these assessments, namely, to collect them from *holders of property* within the districts, language, which by no construction could mean anything else, than that the assessments so turned over, were those against the owners of private property, from whom the city was to make collections; the city surely was not to collect from herself as a holder of property; for a debtor to collect from himself what is due to his creditor, and pay it over to the latter, is an incongruity, the imagination is unable to picture; if this mode of thought were pursued with reference to the holders of private property, the act would have declared it their duty to collect from themselves and pay over to the city; nor is the "true statement of the claims of said Drainage Commissioners against the city, to be adjudicated and settled out of money collected by the city," a description which would comprehend the assessments against the city, as included in what the board was to receive; the assessments, had prior to 1871, passed into the judgments so strongly relied upon by complainant; and hence, there was nothing to be adjudicated upon; and in any event, the assessment on streets was not to be paid out of money collected by the city from any one, but out of its own hands.

It is no answer to say that the transfer was for the purpose of collecting these amounts; this is limited to assessments against the holders of property, in which category the city could by no interpretation be

included; nothing could be accomplished for the warrant holders by making the city transferee of the judgments against herself; it was indicated in the clearest manner that the assessments against public property were not contemplated by the act of 1871; whether because they were regarded as invalid, or for any other reason, need not be determined; the exigencies of defendant's case are sufficiently met in this regard, if the fact be, that the assessments against streets, squares and property of a like character were not, as complainant insists, and the Court of Appeals declares, confirmed and made exigible by the act here insisted upon by defendant of 1871; the construction of that statute harmonizes with its argument that the act of 1858 did not intend that such property should be assessed; that the act of the commissioners in placing it upon the rolls was arbitrary and without legal effect, and that the judgments of homologation all on their face purporting to be rendered in accordance with the statutes authorizing the assessments, could have no greater effect than the statutes and assessments themselves; there would be as much authority for the commissioners to have placed upon the rolls property situated outside of the drainage districts, as there would be to place thereon property within them, but not of the character which the statute intended to be assessed.

With regard to the declaration in the opinion, that the drawing of the warrants against the drainage fund, composed largely of these very assessments and judgments, operated as an estoppel to deny their own existence, it is respectfully submitted that it assumes against defendant the entire matter at issue; the warrants were drawn against the drainage taxes, and in no particular was it undertaken to define what they were, nor is there any fair implication as to what taxes composed the fund; to draw a warrant against drainage taxes, without specification as to the property which is assessed, and the persons who are involved therein, while it might assume the existence of a fund of some sort, leaves entirely at large any question as to whether assessments against public property formed any part thereof; the physical existence of certain rolls on which streets and like property were assessed, does not, in the faintest degree, import anything as to their legal effect, or that they had any; during the many years from 1858 to 1871, the city had not paid one dollar of these so-called assessments, and during that period the municipality had enjoyed prosperous times; no warrant holder ever attempted to enforce against her, any right based upon the city or the streets, being liable to drainage taxes; Van Norden himself, in 1872, instead of, by mandamus or other proceeding, attempting to realize from the city the large sums now imagined to be due for assessments on public property, and thus realizing in cash to the extent thereof, contented himself with obtaining relief by the city's bonds, which, by the act under which they

were issued, he was required to take at a discount; instead of these assessments being confirmed by the act of 1871, as far as any fact can be declared and acquiesced in by silence and inaction, the non-liability of the city was established, not only by its own conduct, but by that of every holder of drainage warrants; if, in 1876, as is declared in the bill, with reference to the failure of the city to prosecute the work of drainage, as shown by the evidence of Brown to be due to the lack of means, it had an unlimited power of taxation, it is extraordinary that Van Norden, who at that time was a large holder, both of work and purchase warrants, abstained, for the purpose of paying the judgments against her, from any attempt to enforce the exercise of his power, by appropriate legal proceedings.

The assumption in the opinion that the Supreme Court of Louisiana has held the city liable for assessments made on the area of streets, if scrutinized, is seen to be altogether unfounded in fact, so far as any application to the present case is concerned.

As to the first case cited, that of the Drainage Company, 11 An. 338, it may be premised by saying that the question of liability of streets, etc., to local assessment was not before the court, which, as to this question, decided nothing. But in order to be certain as to this point, it would be well to subject the opinion of the court in all its parts to the closest scrutiny.

The first point raised, was that the charter of the company was unconstitutional (see page 339), the claim of unconstitutionality being based upon several grounds set out in detail, the first of which, namely, that the charter imposed taxes upon a portion of the community only, for a work beneficial to the public at large, was sustained, and there the whole matter would have ended, had it not been that a rehearing was granted in the case.

On the rehearing the court held, first, that as the legislature had the power to drain the swamp in the rear of the city by its own agents, it had also the power to do it through the intervention of a company created for that purpose; second, that the charter of the company was not in violation of article 124 of the constitution of 1852, which provided that the citizens of New Orleans should have the right to appoint the several public officers necessary for the administration of the police of the city; third, that the mode of paying for the work done by the Drainage Company was not in violation of article 123 of the constitution of 1852, or of article 127 of the constitution of 1845, which provided that taxation should be equal and uniform throughout the state (see pages 372 and 373); fourth, that the charter of the company was not violative of article 105 of the constitution of 1852, so far as it provided that vested rights should not be divested, unless for the purposes of public utility, and for adequate compensation previously made; as to this point, however, the court took occasion to say (p. 373):

"We have not understood from counsel that there are any cases in which the property has not been so far benefited by the work done as to be increased in value more than the cost of the work assessed. Were not this the case, the property of each proprietor, to the extent of the difference between the increased value and the cost of the work assessed to him, would be taken for a purpose of public utility without adequate compensation previously made, and consequently there would be a violation of the provisions of article 105 of the constitution."

It is not proper here to observe that the principle thus announced by the court is identical with that declared by act 67 of 1877 (see page 106), attacked by complainant as being an impairment of the obligation of his contract; the act of 1877 says that the true intent and meaning of all drainage laws of this state where liens and privileges are recorded against the property requiring drainage, are that under the same no assessments or judgments can be collected until after there had been conferred upon the property such improvements as will effect drainage equal in value to the assessment exacted from the property; in his view the act of 1877 would have introduced no new element or principle by which complainant's rights were affected; the principle declared by the act of 1877 was announced by the Supreme Court in the Drainage Company's case in 1856, two years before the adoption of the first statute under which complainant asserts his rights.

Proceeding, however, with our effort to show that in the case discussed nothing was said as to the liability of streets and other places for the drainage assessments, the decree in favor of the company was attacked (p. 375), because the citation was by publication, and did not amount to a notice; the court held that the legislature could determine in what manner parties could be brought into court, and that such a notice was valid.

It was next contended that the estimate of the cost of the drainage was not in conformity with the charter, but this the court held was cured by the judgment, and had been acquiesced in by the parties, who had daily seen the work upon the land in progress, and had made no objection or remonstrance.

It was further contended that the company could not recover for any work done on section 2 after the first of January, 1849, the date when it should have been completed; this contention was rejected by the court, which affirmed the judgment of the district court denying the company compensation for work done after a subsequent date, that is, May 10th, 1849.

The next contention concerned the matter of the allowance of interest, as to which the judgment of the lower court was amended; the

homologation of the tableau was opposed again (p. 376) on the ground that the amount should be reduced by reason of the delays of the company in prosecuting the work; this contention was rejected.

It was next contended unsuccessfully that the work as regards section 2 of the drainage area was not promptly done, in that said section was not isolated from other part of the city.

Further grounds of opposition concerning the expenses of cutting the wood and timber standing on section 2, the manner of the charging of interest, and the mode of assessment, were all disposed of by affirming the action of the district court.

We have been at pains to go through the whole of this decision, in order that the minor and incidental references to the matter of streets was the matter dealt with by the court after it had disposed of all the oppostions before it. It does not appear that the assessment against streets was any question put at issue by the pleadings of any party before the court; certainly, the city was not there, as it is here, opposing the inclusion of the streets in the land to be assessed, and the only reference to the subject of streets is found in the conclusion of the court's comment upon one of the effects of assessing lands, of no value, at the same rate as those of great value; one feature of such a method, mention by the court in the concluding paragraph of its opinion, is the imposing upon the city, for the streets, a large portion of the expense; it is obvious that this random expression, by which it is intended only to describe the consequence, if a certain view were taken of the case, and appearing in a mere fragment of the opinion, not adjudicating upon the claims of any person before the court, in any event not upon the city herself, cannot be considered as an authority of even the slightest weight in support of the proposition that the streets were liable to assessment. The subject is spoken of only as a consideration supporting on equitable grounds the assessment in the same manner, namely, by the superficial foot, of all property, whatever might be the differences in value, it was put by the court only as an illustration to show the justice of such a mode of assessment, and obviously its correctness was not questioned and decided, but, on the contrary, assumed.

Nor does the case of Marqueze vs. The City of New Orleans, 13th A. 319, contribute in the slightest degree to the solution of the issue, whether or not the streets and public squares were liable to assessments under the drainage laws in question here; the liability of the city in that case did not depend upon the liability of such property to assessment, but grew out of the express contract made by the city with Marqueze to level, grade and shell Claiborne street, from St. Bernard avenue to Elysian Fields street, on one side of which was a middle or neutral ground which did not belong to any of the front proprietors; in payment of the entire work, the city delivered

to Marqueze, the contractor, bills against the property-owners on the side of Claiborne street opposite the neutral ground, which included the entire cost of the shelling; by section 119 of the city's charter, however, the owners of real estate could only be made to pay the cost of street paving when they owned the property fronting on both sides of the pavement; the effort of the city to throw the entire cost of the paving upon the front proprietors who owned property only on one side of the street was an attempt to force upon them the liability which the city charter said they should not bear; the city itself having made the contract with Marqueze, and in payment therefor having given him an order on the property-holders, which to the extent of one-half was not enforceable, it was required to make good the price at which it had contracted Marqueze should receive for his work; the city could be held liable, irrespective of its alleged ownership of the neutral ground; the property-holder not being the owner of this portion could not be called upon to pay as such owners; the Supreme Court must not be understood as declaring what is denied by the Civil Code, and by numerous decisions rendered prior to the Marqueze case, that the city is the owner of a public street or public square; on the contrary, this is expressly negatived by the language of the court, which is found on page 320, as follows:

"The city is obliged to make and pay for one-half of the paving in the case at bar, not only from the effect of section 19 of the city charter, but also because the middle ground on Claiborne street is the property of the city, and intended and dedicated as a public promenade, for the public use and enjoyment."

It is thus that the city's relation to the property is defined; if the property is dedicated for public use and enjoyment the city cannot, in the sense of the drainage acts of 1858 and 1859, be its owner, because over such she has no power of alienation, nor can she subject it to privilege or mortgage.

It must not be understood that the imposing upon the city of the liability for the shelling in the Marqueze case means that she must pay the assessments upon the streets in the present case; in the former case her relation to Marqueze was one growing out of a contract, while here there is no contract between herself and the Boards of Commissioners who levied the assessments upon the streets; under the statutes at issue here, there could be no assessment to affect any person, directly or remotely, except the owner of the property, and so far as this term is used in the opinion of the court in the Marqueze case, it is clearly not in the same sense in which it is found in the statutes of 1858, 1859 and 1861; the context of the Marqueze decision shows clearly the meaning of the city's ownership therein spoken of; it was an ownership of property which was dedicated to the public use, which

is the same kind of ownership described by the articles of the Code and the decisions, which class the city not as owner, but simply as the administrator of such property.

It will be observed that of the four members of the court but two concurred in the opinion; Mr. Justice Buchanan, having an interest in the suit, took no part in the decision, while Mr. Justice Spofford dissented from that part of the opinion which gave countenance to the claim that the city was the owner of the neutral ground, and which subjected the latter to any part of the cost of paving; Mr. Justice Spofford concurs in the decree on the ground that the city warranted the validity of the claims against private owners given to the contractor, and that the contractor having by judgment been defeated in the collection of his claims, the city was liable to him for the same; the decision in the Marqueze case being rendered by only two judges out of four, one or the other two taking no part in the case, and the other having dissented from the views contended for by complainant, is but feeble if any authority in favor of the proposition that the city is the owner of the street or public place, opposed as it is to the textual provisions of the Civil Code and the general jurisprudence of the state.

The case of Correjolles vs. Succession of Foucher, 26th An. 362, so far as the facts are concerned, is similar to the Marqueze case, except that the defendant's attorney in that case, the Hon. Edward Bermudez, late Chief Justice of the Supreme Court of the State of Louisiana, did not go the length of claiming that the title to the neutral ground on St. Charles street was in the city, but contented himself with the claim that it was neither in the Carrollton Railroad Company or *the public;* it will be noted in the 26th Annual case, while it is declared that the case is controlled by the Marqueze case, in construing the latter, the court says that it was there held that the middle ground of Claiborne street belonged to the city as a *locus publicus*, and the city was bound to bear one-half of the expense of constructing a road on the north side of Claiborne street; to say that the neutral ground belonged to the city as a *locus publicus* is to say that it did not belong to the city in ownership, of which a *locus publicus* is not susceptible; as to public places the city has simply a right of administration, the fee being in the people; we are, therefore, verified by the 26th Annual case in our construction of the Marqueze case to the effect that it was not intended by the latter to say that the neutral ground on Claiborne street was susceptible of ownership by the city; the determination of the Marqueze case being that the ground belonged to the city and was dedicated to the public use and enjoyment, terms which when construed together mean nothing more than the definition of the city's possession in regard to such property under the articles of the Code; the 26th Annual case brings out conspicuously this feature of the

Marqueze case, where it declares that the middle ground of Claiborne street belonged to the city as a *locus publicus*, which means that the city was its owner in the narrow and restricted sense of an administrator for the public good and use.

The constitutional amendment of 1874 (see acts 1869, page 1), prohibited the city from increasing its debt in any manner or in any form or under any pretext after the first of January, 1875; it forbade the drawing of any warrant or other order for the payment of money, except against cash actually in the treasury; it contained a proviso that the amendment should not be so construed as to prevent the drawing of drainage warrants in favor of the canal company or its assigns for work done under Act No. 30, of 1871, payable exclusively out of drainage taxes; it is difficult to conceive by what exercise of ingenuity the scope and effect of the amendment could be misinterpreted; its evident purpose was to prevent the city from creating any debt, bonded or floating, in addition to that already existing on the 1st of January, 1875; it absolutely forbade the drawing of any warrant except such as could be immediately paid by cash on hand for that purpose, and the permission to draw warrants payable out of the drainage tax alone only brings in bolder relief the inhibition against the drawing of any warrant, or order for the payment of money which, in form and effect, was payable otherwise than out of the cash on hand, or out of the drainage tax.

The amendment as interpreted by the Court of Appeals has furnished an authority, instead of announcing a prohibition against, the city incurring the additional debt; it may be added, in passing, that the claim that defendant's case has not been fully understood by the Court of Appeals is fully vindicated by its remarks in reference to this part of it; it is said: "It would seem that the authority to issue warrants against the drainage fund after that date necessarily implied an affirmation of the right of the city to the completion of the drainage work then in progress, and imposed a corresponding duty on the city to collect and apply the drainage assessments to the payment of the warrants;" when it is considered that the "work then in progress" was being conducted, not by the city, but by Van Norden, as transferee of the company, and the city was under no duty,—nay, had no right to carry on the work or to meddle with it in any manner at all, and she had no connection with the same until some two and a half years afterwards she took charge of it under the act of 1876, the failure of the defense to make the facts of its case appreciated by the court is lamentable indeed; the other inference of the court that the right to draw warrants imposed a corresponding duty to collect and apply all drainage assessments to the payment of the warrants is pregnant with the suggestion that it had no such duty to perform as to the assessment against itself on streets and other public property, since as to these

there was nobody to collect from, the city herself being a debtor, and her duty, if any at all, founded upon the assessments, being to pay and not to collect; in the language which follows, the court has disregarded all distinctions between assessments against private property, or the owners thereof, for which the city is said by the bill to be responsible by reason of her failure to collect, and the assessments against the city herself, as to which, at most, she is a debtor, and her duty simply to pay; the wide difference and important distinction between the status of each of these classes of taxes are completely annihilated by the court, when it says, in its remarks on the amendment of 1884, that "these taxes, being liabilities of the city, cannot by any cause or reason be included in the clause prohibiting the increase of the debt of the corporation without imputing to the authors of the constitution an intent to defraud those who might deal with her under the invitation of the constitution."

If the amendment has succeeded in making anything clear, it is that the drainage assessments there spoken of are not liabilities of the city; on its face, the language repels any such meaning or inference. The assessments against the city alone could by any possible construction be deemed liabilities of the city when the amendment was to go into effect; the assessments against private property were not and had never at any time been considered as liabilities of the city, but were obligations of private property, and of the owners thereof; the amendment, of course, did not obliterate any liability which the city was already bound to, but surely it could, in no event, convert an assessment against private property into obligations of the city; the so-called assessments on streets and squares, etc., as we have argued elsewhere, were never at any time binding upon the city and altogether without effect as being made without any authority of law; the intent of the constitutional amendment was that the city should not, by any process whatever, become a debtor of more than she owed on the first of January, 1875; therefore, this act of purchase in 1876 could not, in any of its results, whether by reason of misconduct on the part of the city or not, be made to assume any form by which the city, in consequence, would be a debtor of one dollar in excess of her indebtedness on January 1st, 1875; the ground upon which the city is said to be made liable herein is that she abandoned the work of drainage and neglected to collect the tax, but if the amendment be given its proper effect, the city could not, by such negative conduct or acts of omission or neglect, do that which she was forbidden to do in the most positive and solemn manner, she could clearly make no contract in violation of the amendment, and, hence, could not, by inaction, accomplish that which she was positively and directly forbidden to do.

Such limitations upon the power of a municipality to incur indebtedness have always been upheld and have never been disregarded upon the plea either of convenience or necessity.

The constitutional amendment of 1874 prohibited the city from adding to its debt under any pretext whatever. The prohibition is sweeping and extends to any increase of debt in any manner or in any form; it matters not how necessary the work of drainage may be or may have been considered. The purpose of the amendment was to strip the city of any discretion whatever as to the increase of its debt. The debt could not be augmented, however necessary in the city's judgment. Of all of this Van Norden had full notice when he sold to the city.

It matters not how great may be the necessity, real or apparent, for the city to incur debt beyond the constitutional limit, the prohibition, and not the necessity of the expense, controls. This is well settled by authority. A limitation on indebtedness imposed by constitution or charter extends to all forms of debt, bonded or floating, and embraces all transactions which may involve or affect indebtedness of any kind beyond the limit allowed.

In Prince vs. Quincy, 105 Illinois, 138, the city undertook to contract for the construction of water works for a sum which, added to its existing indebtedness, exceeded the constitutional limit of five per cent. on its taxable property. It was claimed that a water supply was a necessary requirement of the city, and its provision was an item of ordinary current expense incident to the city's power of government and administration. While the necessity for work was admittted, the court held the contract to be void, as beyond the constitutional power of the municipality. The court declared that the rule applied was well settled in Illinois and admitted of no exception, citing several instances in support of its conclusion.

In Sacket vs. New Albany, 88 Indiana, 473, under a constitutional provision, in all respects similar to that of Louisiana, limiting municipal indebtedness of municipal corporations to two per cent. upon its taxable property, recovery for the price of a system of fire alarm, the necessity and importance of which is readily seen, was denied on the ground that the contract, if permitted to stand, would create an indebtedness exceeding the limit. As in the case just cited, it was there contended that the contract should be upheld on the ground of the absolute requirement of a system of fire alarm for the protection of property, but this was found insufficient to sustain the contract, in view of the limitation of indebtedness.

In Valparaiso vs. Gardner, 97 Indiana, 1, under a similar provision of the constitution, a like rule was affirmed, although in the particular case the contract in question was held not to be a debt, and hence removed from the limitation of indebtedness.

In National Bank vs. Independent District of Marshall, 39th Iowa, 490, the contract of a school board for the construction of a school house, a purpose directly within the powers of the board and obviously a necessary object for the performance of its duties, was declared void for the reason that its payment would be in excess over and above the indebtedness permitted by the constitution.

In Davis vs. Des Moines, 71st Iowa, 501, a local assessment for the construction of a sewer was contested by a property owner on the ground that its cost would increse the city's debt, in violation of a constitutional provision by which it was limited to a certain amount. It was held that the assessment which was to be paid by the owners of the adjacent property was not a debt of the city, by reason of which it was not affected by the prohibition. On this ground the assessment was upheld, but the rule that all municipal indebtedness in excess of the constitutional limit was void, however necessary the public work for which it was contracted, was null and void, was declared.

This case is instructive in the present controversy. The drainage assessments as levied under the act of 1871 are fully recognized by the constitutional amendment of 1874. In this form they are not affected injuriously by the amendment; but any process by which they are to be converted into absolute debts of the city is in the teeth of the amendment, by which the city is prohibited from increasing her debt after the 1st of January, 1875, *in any form or in any manner or under any pretext.* In the face of such absolute injunction, the failure of the city to complete the work of drainage and collect the assessments could not make it the debtor of the warrants sued upon. The amendment intended that not one dollar should be added to the city's debt no matter what the pretense. It would amount to little, if mere neglect or failure of duty could bring about the very result which it was the purpose of the amendment to make impossible.

In Scott vs. Davenport, 34 Iowa, 208, the city was expressly authorized by its charter to construct a water works plant. Here, too, the necessity of a water supply was imperative; yet, notwithstanding the express charter authority and the necessity of the work, the contract was annulled on the ground that it created an excess of indebtedness over and above the constitutional limit.

In Council Bluffs vs. Stewart, 51 Iowa, 385, proceedings for the opening of a street, the work to be paid for by an issue of bonds, were set aside on the ground that the bond issue would increase the municipal debt beyond the constitutional limit. The public requirements which necessitated the opening of the street were considered insufficient to remove the contract from the constitutional rule, the court holding that the limitation applied to all debts of every description, for whatsoever purpose contracted.

In the decisions mentioned there are cited many cases upon the question at issue, they are respectfully referred to the consideration of your Honors.

See also Read vs. Atlantic City, 49 N. J. L., 558.

In appeal of City of Erie, 91 Pennsylvania St., 398, a contract for the construction of a market house, a necessary adjunct of municipal government, was attacked on the ground that its price would add to the city's debt to an extent that would exceed the limit placed upon it by the constitution. The contract was held void on this ground.

The decision of the courts of last resort of Illinois, Iowa, New Jersey and Pennslyvania, above cited, are in full accord with the jurisprudence of this court upon the same subject.

In Buchanan vs. Litchfield, 102 U. S. 278, bonds were issued in payment for the erection of water works; the bond issue with the existing municipal indebtedness exceeded the constitutional limit of five per cent. upon the taxable property of the city. Upon this ground the bonds were held void.

In Litchfield vs. Ballou, 114 U. S. 190, the contractor who built the water works just mentioned, sued to recover the money expended in their construction. The bonds, as is seen, having been decreed invalid upon the same ground, namely, that the contract violated the constitutional limit of indebtedness, the relief sought was denied. The prime necessity of the work in question as a means of supplying the city's inhabitants with water was one of the conditions of the suit, but this in no respect hindered the court from maintaining the constitutional limitation of indebtedness.

In Doon Township vs. Cummings, 142 U. S. 366, bonds in excess of the constitutional limit were issued. They were, however, to be used in retiring previously existing debts, which were within the limit, and hence in the result there would have been no increase in the debt. This court held, however, that there would be an undoubted increase in the interval between the issue of the bonds and the taking up of the old debt, and this violation of the constitution, though temporary, and as the initial step towards paying a lawful debt, could not on that account be excused (page 372); the bonds were declared void.

The Supreme Court of Louisiana has had frequent occasion to construe and give effect to the constitutional amendment of 1874, and in every instance has maintained its most rigorous enforcement.

It has been said that this amendment "was a perfectly constitutional provision, operating *in future* only, and absolutely binding, not only upon the City of New Orleans, but on all persons dealing with the city. No clause or commentary can make its meaning more perspicuous. It rendered it impossible for the city, by any voluntary act, to increase her debt, in any manner, form, or under any pretext, and all persons were fully charged with notice that whatever services they

might render, and whatever supplies they might furnish, that they could never become creditors of the City of New Orleans, because she was incompetent to contract additional debt." Taxpayers' Association et al. vs. City of New Orleans, 33 Louisiana Annual, 571.

In another case the court says: "We have rigidly enforced the constitutional amendment of 1874 as to debts created after its passage." Taxpayers vs. New Orleans, 33 Louisiana Annual, 568; State *ex rel.* Marchand, 37 Louisiana Annual, 19 and 20.

See also State *ex rel.* Gaslight Company vs. City of New Orleans, 37 Louisiana Annual, 438, citing Eager vs. New Orleans, 36 Louisiana Annual, 937.

State *ex rel.* Wood, Board of Liquidation, 40 Louisiana Annual, 413.

The pleas of prescription, in so far as their discussion is concerned, were ignored by the Court of Appeals; as to the assessment against the city, which had been merged into judgments, the plea was unquestionably good; there were two classes of taxes for which the liability of the city is sought to be fixed; first, those against private property; and, second, those against streets, public squares and property of a like character; as to the first, from their origin they were charges against private property assessed and the owners thereof, they were not in any sense liabilities of the city; the contention of complainant is that the city has become liable for these assessments by reason of her failure to collect them and her abandonment of the drainage work; this failure and abandonment occurred in 1876, when the constitutional amendment was in force, which, by its very letter, was an insuperable obstacle to the city becoming the debtor of these assessments by any process whatsoever; the second class of assessments, those against public property, are charged against the city as the primary debtor.

In defense it is claimed that there was no authority under the act of 1858 for the making of these assessments; that, although, as a matter of fact, such property was listed by the commissioners, that this was a mere act of power, without warrant of law, and hence devoid of legal effect; it is argued, however, by the complainant, that this objection cannot now be made because the assessment rolls have been homologated,—have been merged into the judgments by which they were homologated, and any question as to their illegality has been thereby foreclosed; as to this, it may be said that the judgments could have no greater force than the statutes which they were rendered to carry into effect, for the purpose of execution by collection through the sheriff, of the assessments intended to be authorized; whatever the statutes mean, the judgments mean; the latter are interpreted and limited by the statutes, which declared the liability which the judgments were designed to fix; the soundness of this position is maintained by the

judgments themselves, which expressly declare that they are rendered in accordance with the acts of 1858 and 1861, by which reference the statutes are imported into the judgments as part thereof; and if there be doubt as to their meaning and effect, the judgments declaring that their purport and significance, are to be the same as the statutes in question, they are necessarily controlled and limited by the latter; the doings of the commissioners and the homologation extending no further that the authority derived from the statutes; hence, if the assessments on public property was beyond the power of the commissioners conferred by the act of 1858, the judgments did not, nor were they intended to enlarge the authority of the commissioners.

In the attempt to escape the effect of such interpretation of the laws as would make the assessments on streets, public squares, etc., null and void, by the claim that such question is closed by the judgments of homologation, the complainant falls into another difficulty, equally if not more serious.

If the decrees of homologation are judgments, so far as to close all matters of defense which might have been urged before they were rendered, it is impossible to save them from the effects of other rules applying to judgments; one of these is that established by article 3547 of the Revised Civil Code, by which judgments are prescribed in ten years, saving, however, to the judgment creditor or any other person interested in the judgment, by a timely suit, brought within ten years from its rendition, to save the judgment from prescription; this latter provision would do away with all pretense of the city utilizing its status as a so called trustee to allow the extinguishment by the lapse of time, of the judgments which its duty was to keep alive; aside from the consideration that a suit by the city against itself as a defendant, for the revival of a judgment against itself would be a startling anamoly, the remedy of the warrant-holders relying in part on these judgments for payment, was wholly within their own hands; as persons interested in the judgments they were, under article 3547, of the Revised Civil Code, authorized to have brought suits for revival of the judgments themselves; of course, possessing the merit of possibilty, while the process of the city suing herself would be difficult to conceive; if the judgments had, therefore, perished by the lapse of time, the responsibility lies not at the door of the city as is contended, but is chargeable to complainant or his assignor and his fellow warrant-holders.

This defense is disposed of by the Court of Appeals with the single remark that the act of 1876 created an express trust in the city, in which the city undertook as trustee to collect and apply the drainage assessments to the payment of the warrants; and that the statute of

limitation is not set in motion until the trustee has disavowed the trust, and notice of its repudiation had been brought home to the *cestui qui trust*.

When it is considered that the act of 1876 says nothing whatever as to what composed the drainage fund, whether it was assessments against private persons and property, or assessments against streets, public squares, etc., and the city or both, it is difficult to understand the assumption that the act made the city a trustee of all character of assessments; if any part thereof, as they then stood upon the books, were invalid in law, there was nothing in the act of 1876 which could make them valid; there is no suggestion that the act of 1876 was to have any curative effect, or to make valid that which was before invalid.

We have seen that by the act of 1871 there was turned over to the city and she was directed to collect only the assessments on private property, and it will be strange indeed if the act of 1876 was intended to so enlarge the city's responsibility as to charge her as trustee of the assessments against herself, and to have done so merely by implication.

And conceding, for the sake of argument, that the position of the court, altogether at variance with the law, is justified, its answer to this part of complainant's case would still perish when tested by its concluding portion, to the effect, that prescription is suspended until the trustee has disavowed his trust, and knowledge of such repudiation is brought home to the *cestui qui trust*.

The bill charges and the record shows that the work of drainage was abandoned in 1876, the effect of which, according to the bill, was to make the tax unenforceable; it would be a very violent presumption that such conduct by the city, attended with all the public notoriety surrounding a municipal act of such important and far reaching consequences, could have been done without coming to the knowledge of Van Norden, who had received three hundred thousand dollars of the warrants, to be paid out of the drainage taxes alone, which could not be collected unless the drainage system was completed.

To suppose that Van Norden, or the other warrant-holders, if, by that time, he had parted company with any of the warrants, would have been in ignorance of the conduct of the city, which is bitterly complained of in the bill, would be a severe tax upon credulity. This suit was instituted November 26th, 1894, about eighteen years after the city had ceased to prosecute the work of drainage, and consequently repudiated her trust, so called; the lapse of ten years alone would be sufficient to sustain the plea of prescription of the judgments against the city, even if she occupied the grotesque position assigned her by the Court of Appeals—that of trustee of a debt, if due at all, due by herself.

To sustain the imprescriptibility of the assessment judgments—and it is only against these, and not against those against private property, that the prescription of ten years is pleaded—the court cites the case of Southern Insurance Company vs. Pike, 32d Louisiana Annual, 1037; McKnight vs. Calhoun, 36th Louisiana Annual, 408; if there be any resemblance between these cases and the one at bar, or any analogy between the propositions therein involved, and those concerned here, it is not revealed by the most searching examination; the slighest examination of these authorities will make this clear.

Regarding the statement of the opinion that under Insurance Co. vs. Pike, 32 Louisiana Annual, 403, that the trust created by the act of sale was continuing and executory, and under it the city undertook, as trustee, to collect and apply the drainage assessments to the payment of the warrants, it may be said that the authority of the Pike case, and the others cited, are not questioned, but they are altogether without application in the present instance; the city here does not plead prescription against her accountability as trustee of the drainage taxes due by private individuals; she claims that the judgments against herself have been extinguished by prescription; we have argued that as to these judgments she is not a trustee, but a debtor, and all debts are subject to the statute of limitation in this State; the Pike case touches no question bearing any resemblance to the one at issue; Pike took possession of all the books, accounts, assets and property of the Southern Insurance Company, with the obligation to collect and account for the assets; an action for an account could never be prescribed, except from the date that he repudiated the trust; this is no authority against the position that judgments against the city, like judgments against any other person, are subject to the law of prescription.

The Succession of Farmer, 32 Louisiana Annual, 1037, and McKnight vs. Calhoun, 30 Louisiana Annual, 408, are cited by the court to show that the city cannot claim a release from its indebtedness to the drainage fund by pleading its own neglect to revive the judgments in proceedings to that end, when necessary; we have demonstrated, as we believe, the utter impossibility of the city bringing a suit against herself for the revival; on the other hand, the plain, positive, textual provisions of the Code gave the warrant-holders the right to bring such suits themselves; in view of which it is deemed not disrespectful to say that the court has fallen into the error of charging the city with neglect on account of her failure to do what she could not do, and have given no effect whatever to the fact that the power to keep the judgment alive was at all times in the hands of the warrant-holders.

The Farmer and McKnight cases simply hold that the prescrip-

tion of a debt is suspended so long as there exists between the creditor and debtor such relation as will prevent any suit for the debt; there was nothing here to prevent the drainage warrant-holders from having their judgment against the city executed, or to have saved them from prescription by bringing suits to revive; the dissimilarity between the cases cited and the cause here is conspicuous.

As to these judgments the city is not a trustee; the Pike case and those of like character have no reference to the prescription of debts or judgments dischargeable in money, but even if they did, and the city be considered to any extent in the fiduciary relation as regards the judgments, this would not deprive the city of the benefit of prescription, not only under the articles of the Code themselves, but their construction by the Supreme Court of Louisiana; it has been held by the Supreme Court of the United States that "no laws of the several States have been more steadfastly or more often recognized by this court from the beginning as rules of decision in the courts of the United States, than statutes of limitations of actions, real and personal, as enacted by the legislature of a State, and as construed by its highest court;" Bauserman vs. Blount, 147 U. S. 647, 652, citing numerous authorities; also Beal vs. Odeu, 163 U. S. 73.

In concluding its remarks upon the subject of this plea, the court says that it is doubtful whether statutory assessments of the character in question are subject to any prescription at all, and cites Reed vs. His Creditors, 39 Louisiana Annual, 115, which, in turn, cites State vs. Jackson, 34 Louisiana Annual, 176, and Davidson vs. Lindop, 36 Louisiana Annual, 707, to the effect that prescription established by the Civil Code does not apply to taxes; this part of the opinion again recalls the lamentable failure of the defendant to make its case clear.

The answer is barren of any plea of prescription leveled against the assessments themselves. The prescriptions pleaded are, first, that applying to the warrants sued upon, which is an "effect transferable by endorsement or delivery," any action upon which is barred by the prescription of five years; second, that of ten years, which bars any and all personal actions of any character whatsoever, established by article 3544, of the Revised Civil Code.

These two prescriptions, it will be observed, apply to the actions, and not to the grounds of liability, which it is brought to enforce; they do not concern themselves with the strength or weakness of the title; the action, however otherwise well founded, cannot be brought after the lapse of time stated in each case; the inquiry does not extend to the merits of the action in any respect; these articles bluntly declare that after the lapse of five years in one case, and of ten years in another, the action cannot be brought.

It is unnecessary to say more to point out to the court that these

two prescriptions are too widely different from to be confounded with any plea of prescription against the assessments which this suit is brought to enforce.

The other prescription—the one immediately under discussion, that of ten years—applying to judgments, concern the latter alone, and not the assessments which the complainant insists have been merged and lost in the judgments themselves.

A slight examination of Reed against His Creditors, State vs. Jackson, and Davidson vs. Lindop, will inform the court that two things cannot be more widely apart than the principles upon which the cases were decided, and that which they are cited by the court to uphold.

Whether or not the assessments in question are subject to prescription at all, which the court says is not certain, but only doubtful, the decisions of the Supreme Court of Louisiana cited to show that they are not, it is respectfully suggested do not at all sustain the proposition; they were interpretations of special statutes, altogether different in character from the assessments here, they concerned general taxes and not local assessments; the case of Reed vs. His Creditors, held that city taxes levied under section 20 of the charter of 1870, were by its express terms imprescriptible; that state taxes, levied under the provisions of act 37, of 1871, and act 36, of 1869, found by the court to contain language of similar import to that contained in the city charter, were not subject to the laws of prescription; in both cases the taxes were held imprescriptible because the statutes under which they were levied said so; far from sustaining the position that the drainage taxes were originally imprescriptible, they would rather tend to the contrary, because the law of 1858 contains no express exclusion of the law of prescription, while the statutes under consideration in the Reed case were held to save the taxes from prescription, because it was so said in terms.

Davidson vs. Lindop, 36th Louisiana Annual, 765, is also an interpretation of section 20 of the city charter of 1870, containing a clause which made the taxes imprescriptible; the Jackson case, 34th Louisiana Annual, 178, was likewise a construction of special statutes, under which general taxes were levied, presenting no point of resemblance to the assessment acts under consideration here; we have argued in our original brief to the Court of Appeals, page 39, that under article 3547 of the Revised Civil Code, in ascertaining whether or not the prescription which operates as a release from debt should be applied, the law regards simply the lapse of the requisite time; that in such a prescription, unlike that by which property is acquired, neither good faith nor a just title is necessary; this would not, as seems to be supposed, involve the monstrosity of freeing an agent or trustee, to whom property has been confided for another, from the obligation

of accounting for the same, after the lapse of a certain period from the inception of the agency or trusteeship; in such case the obligation of the trustee would not be to pay money, but to account for a trust. Prescription, it is true, as to the accounting, would not begin to run until the trustee had placed himself in antagonism to his trust, by setting up a title inconsistent with it or repudiating the same; but here we have no such question to deal with; the city pleads that she has been released from any debt founded on the drainage judgments against her by the lapse of ten years from their rendition; we are told that the city herself should have revived these judgments; but, as has been shown hereinbefore, ~~and the two briefs~~ that this it was impossible for the city to do, had she so desired, for she could not sue herself and occupy the position of both plaintiff and defendant in the same suit, while on the other hand, the warrant-holders were at full liberty, under the articles of the Code, to have brought their own suits for revival.

It should be borne in mind, however, that, as the contest and all the transactions relied upon by complainant began and ended in the State of Louisiana, they are governed first by the laws of that State; under ~~its~~ laws, good faith is not required to enable a party to invoke the prescription which operate as a release from debt, articles 3528, 3530, 3550 of the Revised Civil Code; under the law of that state, the fact that a party is a trustee does not deprive him of prescription *liberandi causa;* in a case like the present, we have already shown that the cases of Insurance Company vs. Peake, Succession of Farmer, McKnight vs. Calhoun, are so different from the present case both in point of fact and the law to be applied, that they are no authority in this controversy.

On the other hand, it is established by decisions of the Supreme Court of Louisiana that a party occupying the supposed position of trustee, which the city is driven into by the opinion of the Court of Appeals, may plead prescription against liability resulting therefrom, under conditions similar to those found here.

That the city was the trustee of the drainage judgments, charged with the duty of collecting them, and consequently cannot be heard in any respect to impeach their validity, and hence is estopped to set up that the judgments against it are prescribed, finds no application here; the law of prescription is found in the Civil Code, which is a statute of the State of Louisiana, as to the construction of which the decisions of the Supreme Court of Louisiana control; in the case ~~cited~~, of Brown vs. Insurance Company, 3d Louisiana Annual, 177, the facts were identical with the present case; certain parties were directors of a corporation, among the uncollected assets ~~of which~~ were certain stock subscriptions due by the directors themselves; these were never paid, nor were any steps for their collection taken

by the directors; in this condition ten years elapsed from the time the subscriptions became due, at which period a judgment creditor of the corporation, which latter had become insolvent and passed into the hands of liquidators, garnisheed one of the stock subscribers, who was also a director; he set up that the obligation was prescribed; the court said that the directors had neglected to act in the matter, notwithstanding which, the creditors of the company were not without remedy; that they might have caused the company to be administered, and the necessary calls to pay the subscriptions made and enforced; that the prescription which operates as a release from debt does not require the debtor to produce any title, or that he should be in good faith (Revised Civil Code, article 3530); the neglect of the creditor alone operates the prescription; when he is present, and his silence has continued for ten years, the law presumes payment; that good faith being not required for that class of prescription, the relation which existed between the garnishee and the defendants could be no obstacle to it; the court said it must hold, therefore, that the relations of the party under the contract or the charter did not affect the general law on the subject.

In Wagoner vs. Philips. 22d Louisiana Annual, 152, it was held that article 3476 (now article 3510), to the effect that those who possess for others, and not in their own names, cannot prescribe whatever may be the time of their possession, which, in substance, is the principle contended for by complainant here, namely, that the city as trustee cannot plead prescription of the judgments against herself, of which she was the custodian, did not apply to the prescription which operates as a release from debt; that the presumption of payment resulted from the lapse of the necessary time, *juris et jure*.

It is contended, however, that there are decisions of the Supreme Court later in date which overrule, Brown vs. Union Insurance Co.; the decisions cited are the following, as to which it may be said that no one in the slightest degree impeaches the authority of the Brown case found in 3d Louisiana Annual; this is apparent from the slightest examination of the cases.

The first is that of the Succession of Farmer, 32d Louisiana Annual, 1037; this case holds that as an administratrix cannot sue the succession she represents, prescription will not run against her on her claims against the succession as long as she is administratrix, because, being legally incapacited from judicially enforcing her claim by the law, its prescription is suspended under the law of *contra non valentam prescriptio non currit;* see 32 Louisiana Annual, p. 1041; a dictum altogether foreign to any question involved here.

McKnight vs. Calhoun, 39th Louisiana Annual, 408, to the effect that where there is a debt due by an administrator individually to the the succession which he represented, prescription is suspended during

his administration; there is nothing in this case, however, which touches the rule invoked by defendant; here the assessments are in the form of judgments, and the question is whether those judgments were saved from prescription by the fact that they were against the city herself; in the McKnight case the only party having the right to sue for the debt was the administrator himself, and hence there would be a reason why prescription should be suspended; here, however, the case is widely different; the assessments being in the form of judgments against the city, an action to revive the latter could have been brought by any one interested in the judgments; this, according to the textual provisions of article 3547 of the Revised Civil Code; therefore, the reasoning of the McKnight case finds no application in the present case; in the former, the succession and its creditors were without remedy; here the remedy of the drainage warrant-holders was complete and perfect; they had the right to bring a suit to revive the judgments; they were not left entirely in the hands of the city, as would have been the fact as to the succession creditors in the McKnight case; the city could not *sue herself* for the revival of the judgments, but the drainage warrant-holders had their remedy in their own hands, while in the McKnight case the situation was different; the creditors were without remedy, except such as could be availed of by the administrator himself.

Parish Board of School Directors vs. The City of Shreveport, 470 Louisiana Annual, 1310, is equally wide of the mark; it holds that where the defendant had collected taxes for school purposes, carried as such on the annual budget of expenses, that they must be applied to the purposes specified by the budget, and that the city could not plead prescription of one year against the taxes thus collected; in the present case, the defendant has collected no taxes, and does not plead prescription against any demands for funds which are in her possession, received for purposes designated by law; such would have to be the facts for the 47th Louisiana Annual case to have any controlling influence; the position of the defendant is simply that the drainage warrant-holders have allowed judgments against her to prescribe, and it is no answer to say that she, as trustee, cannot plead prescription; she is not pleading her own laches or neglect, but that of the drainage warrant-holders themselves, who had the right, under article 3547 of the Civil Code, to revive the judgments against the city; having failed to do so, prescription has run, and the judgments are extinguished.

Nor is the case of complainant in any way strengthened by its claim that the drainage assessments are governed by the law of prescription as concerns taxes levied for purposes of general revenue; and this cannot be more clearly demonstrated than by a reading of the two cases cited in support of that proposition; that of Davidson vs. Liudop,

36th Louisiana Annual, 766, declares that the city taxes for the years 1871 to 1879 are imprescriptible, and cites section 20 of the city charter of 1870, misprinted 1879, not the effect that all taxes levied under that charter are declared a lien and privilege upon the property until they are fully paid; it is sufficient to say that the drainage assessments in question here were not levied under the city charter of 1870, and hence that Davidson vs. Lindop, refers to a subject entirely apart from any issue presented here; nor is Reed vs. His Creditors, 39th Louisiana Annual, 115, of any more pertinence; this case simply holds the laws of prescription are *stricti juris*, that at most they constitute a bar to the assertion of rights judicially; that they are neither self-acting nor self-enforcing; that prescription proceeds upon the theory that one in whose favor a right once existed has lost its judicial recourse for its enforcement by reason of his own neglect; that such an equity cannot arise in favor of the subject against the sovereign by reason of the failures of her officers to perform their duty; this case may, in brief, be considered as holding that the law of prescription in the Civil Code has no application to the State or city as a bar to the *collection* of taxes due to either; it requires nothing more than to say that no such question arises here; the drainage judgments are not in favor of the city or the state, but, on the contrary, *against* the former; they exist in favor of the holders of drainage warrants, private persons, and the question here is the reverse of that before the court in the Reed case; there it was whether prescription could be pleaded by a private person against the claims of the city or state for their taxes; the issue here is whether the city herself can set up the bar of prescription against judgments against herself for the benefit of private persons; it is manifest that the two cases touch each other in no single point, and present no single feature in common.

The rule which intended to save from prescription the legal right of parties against money which is to go into the public treasury, and constitute a part of the public fisc, can have no reference to a fund, which, when collected, is to go into the pockets of private persons.

There is a serious ground of complaint against the Court of Appeals in not disposing of the plea of *res adjudicata* made by the answer; this plea, if well founded, would have terminated the controversy, but defendant is left by the opinion in ignorance as to whether or not the consideration of this plea, formed any part of the court's deliberations; in the opinion, it is passed by in silent contempt, but it is respectfully submitted that an examination of the facts upon which it is based, will show conclusively that it should have been maintained.

The plea of *res adjudicata* is based upon the fact that in the case of Peake vs. New Orleans, James Jackson, by intervention, joined with the complainant Peake in the relief which he sought; Jackson sued

upon a judgment at law obtained in the Circuit Court; reference to the petition in that case shows that the warrants of Jackson were not "work warrants" or "construction warrants" as were those sued upon by Peake, but "purchase warrants," issued under the act of the city's purchase made in 1876, under the legislative act of that year, and identical in all respects with those sued upon here by Warner, the complainant; the decree in the Peake case was against complainant, as well as against all those who joined him by intervention, and hence the present suit of Warner is based upon the same cause of action as that set out by Jackson's intervening bill in the Peake case, which, along with the original bill, was dismissed by the Circuit Court.

The presence of the purchase warrants as an issue in the Peake case appears in bold relief in the United States Circuit Court in that case found in 38 Federal Reporter, 782; the point was there made by complainant that a part of the warrants there involved were purchase warrants, and for that reason stood upon a higher footing than the work warrants sued on by Peake, complainant; but the Circuit Court, through Judges Pardee and Billings, held that both classes of warrants were alike, and the city's liability on the purchase warrants was rejected along with that on the work warrants.

The purchase warrants being all alike, that is to say, all issued for the price of the city's purchase—all parts of the same transaction—the status of one is the status of all; and the judgment adverse to Jackson, as regards his warrants, fixed the status of the entire series, including those sued on by complainant, as regards their being the source of any liability of the city; it would be a remarkable result that if Jackson, by reason of his having made an appearance in the Peake case, should have no right to the payment of his warrants, while complainant, standing aloof, should obtain here a decree entitling him to payment for the same kind of warrants, which Jackson failed upon in the Peake case; whatever is true of the purchase warrants sued on in the Peake case, is likewise true of those sued on in the present case; that the difference set up between the two classes of warrants was an issue in the case is shown by the citation thereof from 38 Federal Reporter; but it is sufficient to say that a claim against a city, founded upon purchase warrants, having been rejected in the Peake case, the same claim, made here, should meet with a like fate.

The action of the court in decreeing that the city was the debtor of the drainage warrants sued upon, is without pleading of the complainant to sustain it; the bill proceeds upon the theory that the city has made herself responsible for the drainage taxes assessed against private property and is the primary debtor of those assessments against streets, public squares, etc.; it nowhere asks that the warrants themselves, independent of the taxes, be declared a liability of the

city; it simply asks that the warrants be paid out of the taxes for which the complainant seeks to make the city liable; the error of making an absolute decree against the city is only exceeded by the more objectionable part of the decree, which allows interest at eight per cent. per annum from July 7th, 1876.

Act No. 16, of 1876, provides for no interest on the warrants, neither does the act of sale and purchase, for which the warrants were given, as a price; it is true, that the act of 1871 declares that the purchase warrants shall be issued in the same form and manner as those theretofore issued to the transfer company, under act of 1871, for work done, but this, by no reasonable construction, could be held to include the allowance of interest; nor does the circumstance that the warrants themselves provide that they shall bear such interest after their presentation, non-payment, or their endorsement, showing these facts; the administrator of accounts or of finance, by signing the warrants, could thereby produce no effect not authorized by the statute of 1876, as all of their doings were obviously referable to the statute under which they were acting, beyond which they were wholly without power; the effect of this allowance of interest would be to more than double the amount of the warrants; this will not be countenanced unless within the clear intendment of the law, which, manifestly, does not go this far.

Respectfully submitted,

SAMUEL L. GILMORE,
City Attorney.

BRANCH K. MILLER,
Solicitors for Petitioner.

NOVEMBER, 1898.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

THE CITY OF NEW ORLEANS, A MUNICIPAL CORPORATION, PETITIONER,

versus

JOHN G. WARNER, RESPONDENT.

Brief for Petitioner.

Impressed with the conviction, that if the hard and oppressive character of the contract upon which complainant bases his rights, is once perceived by your Honors, there will be no doubt as to your action, petitioner deems it not unfitting, at the outset, to ask the attention of the court to certain features of the present case, which potently appeal to the fair minded, and strikingly address themselves to the sense of right.

This suit is founded immediately, upon a contract by which, on June 7th, 1876, the Mexican Gulf Ship Canal Company, and W. Van Norden, transferee, conveyed to the City of New Orleans, certain dredgeboats, derricks, barges and other articles, tools and implements, constituting an outfit for drainage work; the price of this sale was three hundred thousand dollars, payable in drainage warrants (see record, page 97).

This same property had been bought by Van Norden from the Canal Company, on November 22d, 1872, for the sum of fifty thousand dollars, paid by a release to that extent, of an indebtedness in a much larger amount, owing by the company to Van Norden. (Record, page 107).

To the ordinary mind, the conspicuous feature of a comparison of these two transactions, is the vast and gross disproportion, between the price for which Van Norden acquired the property, and that for which he sold it to the city; the latter being six times the former.

When there is further considered, the spirited description of the work of canal and levee building done with these very boats and other paraphernalia, from 1871, first, by the company, and then by Van Norden, until they were sold to the city in 1876, one is the more perplexed to understand this marvelous increase in value; unless every-day experience is disregarded and the promptings of common sense rejected, the mind is stunned with the monstrosity of the bargain; surely a court of justice cannot rise to a higher discharge of duty, than the subjection of such a contract, to an ordeal of the closest scrutiny.

It may be replied that by the city's act of purchase, she acquired not only the dredgeboats and like property, but also the rights, privileges, and franchises of the canal company, conferred by Act No. 30 of 1871.

But a reference to the statute will show, that the franchises and privileges of the canal company were to dig canals and build levees, for the prices allowed in the act; the purchase of these franchises by the city, was less an acquisition, than it was the assumption of an obligation to do the drainage work, and collect the cost thereof from the property liable to assessment under the statute; all this for the benefit of Van Norden. It appears by the appraisement, (record, page 95), that the value of the dredgeboats and other tangible property was fixed by the city's appraiser, at one hundred and fifty-three thousand seven hundred and fifty dollars ($153,750); the appraisement contained a reference to the damages claimed by the canal company for delays, upon which, however, no value was placed. It would be interesting to know the basis of the difference between $153,750, the value of the dredgeboats and other property, and the $300,000, which was eventually paid by the city as the price. The claim for damages in no respect entered into this sum, as it is not mentioned at all in the act of sale, which is a conveyance only, of the franchises of the company and of the tangible property mentioned. The first section of the act of 1876, authorized the city to make the purchase and settlement of the canal company of any and all rights, franchises or privileges, arising out of the act of 1871; also, the purchase of all tools, implements, machines, boats and apparatus, belonging to the company or its transferee, used for work authorized by the act of 1871; the second section of the act directs an appraisement to be made of the rights and things to be purchased and settled, if the council should deem it advisable to make the purchase. It is seen that the appraisement of the property reached an infinitesimal amount in excess of about one-half of the amount paid, and that the franchises of the company, which, it may be here remarked, had already been sold by the company to Van Norden on November 22, 1872, were not appraised at all.

A possible explanation of this, may be found in the assumption, that they were considered of no value, or not susceptible of appraisement at all; the mention in the act of purchase, of the payment of twenty thousand dollars ($20,000), in settlement of an amount claimed to have been diverted by the city, furnishes no aid to complainant in this view of his contract, as this was in addition to the $300,000 paid for the property and franchises.

The significance of the facts here adverted to is, that the superiority which your Honors have held to be enjoyed by the purchase warrants, over those issued for work, is founded on the fact, that the former were issued as the price of the sale of property, while the latter were given by a compulsory trustee in payment for drainage work, undertaken by it, in obedience to a direction of the legislature; the fact here shown by the record is, that only a small amount over one-half of the warrants were issued for such price, or at most for the kind of price that was meant by the court, when it made the distinction between the two classes of warrants; and whether or not complainant's warrants are referable to the number which were given for the price of the boats, or to the residue of the total price, is a question at any time difficult, but in the present state of the record, impossible of solution.

The decree in this case, has gone further than the relief prayed for by the complainant; it has condemned the city as the absolute debtor of the warrants sued upon, amounting to six thousand dollars, with eight per cent. per annum interest from June 6th, 1876, more than twenty-two years, which would make in all 176 per cent., this finding if applied to the whole three hundred thousand dollars of warrants, would involve a liability of huge proportions; the complainant nowhere asks that the city be decreed the absolute debtor of the warrants at all, but only that it might be made to account for such taxes as it should account for, and the sum thereof, when ascertained, applied to the payment of the warrants; it will be noted that the statute of 1876, under which the contract was made and the warrants issued, provided nothing as to the payment of interest, nor did the act of sale, passed in pursuance thereof; it is true that the former provided that the warrants "shall be issued in the same form and manner as those heretofore issued to the transferee of said company under Act No. 30, of the acts of 1871, for work done;" and that the latter act provides, that the warrants, after being issued, if not paid when presented, shall bear interest at eight per cent. per annum until paid; but this clause of the act of 1871, in no way concerns the "form and manner," of the issue of the warrants, which was all that was intended in common between the warrants issued for work done, and those for the price of the sale; under the act of 1871, the warrants bore no interest until they were presented for payment; in default of the latter, they were then to bear interest from the date of their presentment, to be

endorsed on the warrants themselves, by the the Auditor of Public Accounts; it is clear that interest on the warrants was a consequence of their non-payment, and the clause allowing it, was no part of the form of the warrant, or of the manner in which it was drawn; the warrant was necessarily a complete instrument, and everything pertaing to the manner and form of its issuance, must have been supplied, before it could be presented for payment; "the manner and form" of the warrants, as conptemplated by the act of 1871, could be in exact accordance with that statute, and yet no interest would ever become due, unless and until it had been presented for payment, its non-payment, and the endorsement thereon by the Auditor of Public Accounts of the city, the date of such presentment.

In a cause depending upon complicated issues of law and fact, and fraught with consequences so grave, as the instant case, every matter of defense should be examined and weighed with the greatest care; it will be found, however, that the opinion of the Court of Appeals contains no syllable of reference to a certain plea of defendant, which, if well made, would save it from all liability; this plea is that of *res adjudicata*, extending to every form of relief sought by the bill; it is based upon the finding of this Honorable Court in Peake vs. New Orleans, No. 852 of the October term of 1890, and reported in the 139th United States, page 342, and is one phase of the present application which, it is deemed, specially addresses itself to the favorable consideration of the court, interested as it is in the correct construction and proper application of its opinions, and in that uniformity which is a paramount necessity in jurisprudence.

The opinion of the court *a qua*, as is endeavored to be shown further along, has, as its fundamental thought, certain principles which this court is supposed to have announced in Warner vs. New Orleans, 167 U. S. 467; it is respectfully urged that a comparison of the opinion in that case, with that of the Court of Appeals in the present case, will reveal that the former has been wholly misconstrued and misapplied.

Addressing itself to the highest source of relief, and basing its prayer upon such considerations as, it is hoped, may control your Honors' judgment, petitioner, whose case has never been before this tribunal in such form, that the strength of its position could be adequately perceived, craves attention to its complaint, against what is believed to be an unjust judgment of the Court of Appeals.

The principal grounds upon which this application is based are that the Court of Appeals has misconstrued and misapplied a decision of this court, Warner vs. New Orleans, 167 U. S. 347; that it has failed to give, not only the proper, but *any* construction and effect at all, to the opinion of your Honors in Peake vs. New Orleans, 139 U. S. 342, in its failure to sustain, or even mention in its opinion, the plea of *res*

adjudicata, based upon the decree in that case; subordinate to these considerations there are others, some springing therefrom, and others independent and substantive grounds of relief.

The grounds upon which the petitioner has main reliance are, that the decision of this court in 167 U. S., has been erroneously construed by the Court of Appeals, as decisive of many important issues in the present case; that the defense of *res adjudicata* pleaded by defendant, is not mentioned in the opinion of the court, and that the city should not be cast until all its defenses have been considered and overruled; subordinately, that the conclusions of the Court of Appeals, as to the liability of defendant, are totally unfounded; for instance, no effect whatever has been given to the constitutional amendment of 1874, or, to be more accurate, it has been given an effect, the reverse of what it was designed to have, and in violation of its very terms; that the four pleas of prescription, each applying to a different phase of the controversy and governed by considerations widely different, have been disposed of by the lower court in bulk, by the single finding that the city, as a trustee, is incompetent to raise them.

The slightest examination of the finding of this court in Warner vs. New Orleans, 167 U. S. 467, discloses what is as plain as anything can be made to appear, namely, that the court had before it two questions, and no others; namely: Was the city estopped to plead its bond issue in discharge of its asserted liability herein, and second: Whether or not the present case was covered by that of Peake in 139 U. S.?

It is evident from a glance at the opinion of the Court of Appeals, though not expressly so declared, that the court conceived itself bound against defendant on the whole case, by what was said when it was before this court on the certified questions; the opening sentence of the opinion is, that "As to nearly all of these defenses, we might well rest our decision in this case on the opinion of the Supreme Court, expressed in its answer to the certified questions;" as a matter of fact, no single defense of those spoken of, save that based upon the bond issue, had made its appearance in the case, as a matter for consideration, until set up in the answer; it is true that in the demurrer of defendant, the case of Peake was pleaded as *res adjudicata;* but considering that this defense was not properly set up in the demurrer, for the reason that it required evidence to support it, it is seen at once that any claim that it was ever considered at all, is gratuitous; it is, therefore, perfectly correct to say that instead of the court being able, if it saw fit, to dispose of all of the defense which appear in the answer, by resting its opinion upon what was said by this court in answer to the certified questions, the fact is, that the defense based upon the bond issue was the only one which had ever been submitted to, and received consideration.

It may be inquired, to what purpose the bond issue is set up in the answer as a discharge from liability, after it having been held by your Honors that it could not be considered as a defense; but this is readily explained; the question submitted on this branch of the case was, whether *under the case stated by the bill*, the city was estopped, to set up the issue of its bonds as a discharge of liability; and, in deciding this question, your Honors said (167 U. S. 475), that, in order to a full understanding of the question to be answered, a review of the facts was essential; and that, for the facts, you would look simply to the statement prepared by the Court of Appeals, and not to the bill and exhibits, copies of which were ordered by the Court of Appeals to be sent you; it will be noted that the conditions upon which the question was to be decided, were specified by the latter, as the facts stated in the bill, while this court declined to examine the bill for this purpose, but confined itself to the statement of the Court of Appeals; neither by the bill, nor by the statement, did it appear that Van Norden himself, or parties to whom he had transferred drainage warrants, or his employees, received the whole of the bond issue in payment of drainage warrants; and that, hence, he was the recipient of all the benefits thereunder; it appeared from the bill that, at the time the bonds were exchanged for warrants, the entire drainage fund outstanding and uncollected was, in round numbers, $1,400,000, and that, by issuing these bonds for an amount in excess of $1,600,000, which were received by the warrant holders at 90 cents on the dollar, that the city had at least put into the fund the whole of it that could have been realized, if every dollar had been collected and paid over to Van Norden; your Honors have said in the Peake case, 139 United States, page 359, that, when the city thus paid this amount into the drainage fund, that as she had no power to make donations, the payment must, in equity, be treated as a discharge of obligations, if there were any; in answer to the certified questions submitted to this Court, it found a difference between the work or construction warrants involved in the Peake case, and the purchase warrants involved in the present case, and held that the city could not be permitted to destroy a fund, against which she had drawn her warrants, in payment of the purchase price of property; that this would result from her pleading, that she was no longer indebted to the fund by reason of the payment, made before the purchase warrants were issued; had the bonds been received by others than Van Norden, or those holding under him, the case would be quite different from what it is in fact, namely: that Van Norden himself, and other holders of warrants received from him, were the beneficiaries of the city's payment; it is clear that if the city be not allowed credit for the drainage warrants that were retired by her bonds, and at the same time be made responsible for the entire fund, as claimed by the bill, that the taxes have been increased by $1,600.00

over what they were ever contemplated to be, by the laws under which they were levied; if Van Norden, or, what is the same thing, persons who had acquired warrants from him, be permitted to receive the fruits of the city's bond issue, and at the same time hold the latter responsible for the balance of the original fund unpaid and uncollected; he would be left in the attitude of receiving, the bonds as a mere gratuity, and at the same time exacting from the city its full measure of asserted responsibility; if it be said that the city by drawing its purchase warrants against the fund, must be considered as affirming the existence of that fund, the answer is, that Van Norden knew precisely what the fund was; and if the city's asserted liability for assessments on streets, public squares, and property of a like character were thus paid and discharged, and he was left with the assessment against private property alone to pay his warrants, it would be only a repayment to the city, of less than one-half the amount of the bonds upon which it was liable and paid, and the proceeds of which went into the pockets of Van Norden himself.

Proceeding, however, the opinion which is marked by a frequent reliance on estoppels, goes on to say that the city's claim that she is not bound by the assessments and judgments against herself, as *quasi* owner of streets and other public places, on the ground that such assessments and judgments should be considered void *ab initio*, for the reason that public property is exempt from taxation, finds that the city, under the principles laid down by your Honors in answer to the certified questions, is estopped to deny their existence and validity, to the same extent that it is estopped to set up its bond issue, as a discharge of its general liability as trustee, with reference to the fund; the court, however, adds, that independent of estoppel, the authorities *seem* to affirm a liability under conditions surrounding the city in the present case; with regard to the estoppel, your Honors have said nothing as to how far the city was bound as to the particular assessments composing the fund; all that you have said is, that she could not impair that fund, whatever it might be, by an allowance of the bond issue, as a credit against it; nothing can be found in your opinion which declares that the assessments on streets and public squares are valid; it is difficult to understand the application in this regard, of the court's answer to the certified questions; the *seeming* affirmation of the city's liability given by the authorities, brought in to support the theory of estoppel, to invite confidence, should be supported, at least, by similarity between the statutes under consideration in the cases relied on, and those involved here; the acts of 1858, 1859 and 1861, bear intrinsic and conclusive evidence, that private property alone was intended to be assessed.

For instance, by section 7 of the act of 1858, directing how the boards shall proceed, it is directed to make a plan designating the

limits of the section to be drained; the subdivisions of the property therein contained, and the names of the proprietors; after depositing this plan in the mortgage office, and advertising such fact, the commissioners are directed to apply by petition to one of the district courts of New Orleans, for that part of the district lying within that parish, and after the observance of certain forms and delays, the court is to decree, that each portion of property situated within the limits, should be subject to a first mortgage, lien and privilege; this clearly contemplates only such property as may be susceptible of mortgage or privilege, which would not include public property; should there be any doubt of this, it is cleared by the further provision of the section, that the drainage mortgage should take precedence over all other mortgages, liens, and privileges whatsoever, whether tacit, conventional, legal, or judicial; in what sense could these mortgages be understood, as applied to public property? That private property alone was intended to be assessed, is declared by the precedence which is given to the drainage mortgage over the other kinds of mortgage named, which could only be applied to private property; for instance, a tacit mortgage is that which a wife enjoyed on the property of her husband, prior to the adoption of the constitution of 1868; a conventional mortgage is one created by contract between one person and another; a legal mortgage is one which results from the registry of a judgment in favor of one person against another; public property is not susceptible of being affected by any of the mortgages named, and the kind of property to be burdened by the drainage judgments is the same kind, and no other, than that which the several species of mortgage named could encumber, that is, property the title to which is vested in private persons.

By section 9, on non-payment of the assessment, judgment could be recovered for the same, and the land assessed be sold; and the board was authorized to purchase, hold and dispose of the same for the benefit of the district; this clearly shows that the kind of property out of which the taxes was to be collected was one which could be acquired by a private person, or by the board itself, or, in other words, property which could be bought and sold by the owner; a seizure and sale of property by judicial process, is only exercising *sub modo*, the right that the debtor himself, would have to sell it; in the absence of an owner with power to dispose of the property, as where the title is in the public or all the people, there can be no seizure and sale for the collection of the tax; property out of commerce, not susceptible of alienation, was not in view by the framers of the act.

The only reference to streets, etc., in connection with the drainage scheme is found in section 8 of act 191 of 1859, which provides that the board shall have access to, and the right of copying, any plan or parts of plans of the city, in the possession of the council,

or any officer thereof, which is to be certified by such custodian to be a correct copy, the same to include streets, etc., or any portion or section thereof to be drained, according to the provisions of that act, or the act of 1858; this section purports to do nothing more, than to secure to the board copies of any city plans that might be needed in the discharge of their duties; the direction is, that the plan shall include the streets of any portion or section which is to be drained; the direction that the copy shall include the streets or any part of the city to be drained, is not a declaration that the streets are to be assessed for drainage; it was merely to make sure, that the board would obtain complete and intelligible plans of any part of the city it might wish, and that the streets were to be delineated thereon, in order to the better understanding of the plan; it would be strange that, after the voluminous provision of the act of 1858, which contains thirteen sections, covering something more than five pages, it should have thus far remained silent, as to the liability of the streets for assessments, and that such liability should be fixed in three lines of the concluding section of the act of 1859; and then only by an inference which narrowly escapes being conjectural; it is incredible that so large an item of revenue should be left to depend upon so frail a title; all presumptions would be against the purpose of making such property liable to assessment, to remove which would require language of unmistakable meaning; as plain as any fact can be made to appear, the section intended nothing more than to secure to the board the right to have copies of the plans so made, that the streets would appear thereon; there is no room for supposing that the copies of the plans so furnished were to be the basis of the assessment; they were only for the use of the board for any purpose which they might serve, as, for instance, to show the boundaries by streets of the private property to be assessed.

Act 57, of 1861, however, removes all doubt as to the non-liability of streets, etc., to assessments; it declares that the amount of the assessment, fixed by the board to be paid yearly by the owner or owners of the lands within the district, for the purpose of the act, shall be exhibited upon a tableau, upon which the property assessed shall be set forth, with the names of the owners, and, as if to emphasize the intention that only such property as was susceptible of ownership by a definite person was contemplated, it is further provided, that if the owners were unknown, the assessment rolls should state that they are unknown; a petition should be filed praying for an order that all persons whom it may concern show cause, in thirty days, why the roll should not be homologated, and that after the publication of said notice, on motion of counsel for the board, the court should homologate the rolls, which should be a judgment against the property assessed, and *the owners thereof*, on which *execution might*

issue, as on judgments rendered *in the ordinary mode of the proceeding;* this again emphasizes the fact that the only property entitled to be reached by the assessment, was property *susceptible of alienation*, and which was *liable to seizure by the sheriff*, processes altogether unknown and impossible, as regards streets, squares, etc.

The act of 1858, in all of its recitals, negatives the idea that public property was in contemplation; it directs that all the subdivisions of property, with the name of the owners, shall appear by the plan; a street has no subdivisions, and the city is not its owner, but is only an administrator of public property for the benefit of the people; significance is given to the fact, that private property alone was intended to be assessed, by the requirement, that where the owner is unknown, that fact should be so stated; private ownership is always found in association with the property intended to be charged; the further provision that the recorder of mortgages should report the drainage lien, privilege, and mortgage, as taking precedence over all other mortgages, legal, conventional and judicial, affirms that the drainage encumbrance should extend only to such property as is susceptible of the mortgages described; and public property is not within this category; the act of 1861, providing that the drainage tax should be collected on execution as in ordinary cases, would necessarily limit the enforcement of the tax, to such property as was liable to seizure and sale by the sheriff; which, of course, would not comprehend the streets, squares and property of a like character.

Streets and public squares are "public things," and are for the common use of the city. Revised Civil Code, article 454.

The drainage taxes are local assessments, which are a peculiar species of taxation; they differ from general taxes in the respect that the latter are levied without any assurance that the taxpayer will be benefited, while the former are made upon the assumption that a portion of the community is to be peculiarly benefited, in the enhancement of the value of property, specially situated as regards the contemplated improvement.

Cooley on Taxation, p. 606, et seq.
Desty on Taxation, Sec. 59, pp. 281-285.

Where there is no peculiar benefit there is no liability for the tax.

Desty on Taxation, p. 285.
State vs. Clinton, 26th An., p. 561.

That the statutes of 1858, 1859 and 1861 did not have in contemplation public property, such as streets, squares, etc., as subjects of assessments, is manifest from the terms of the acts themselves; the assessments were to be made against the property and the owners thereof; the city is not the owner of the streets and squares; they belong in

common to all the inhabitants of the municipality. Revised Civil Code, article 458; the city has no relation to them except an an administrator, with the right to regulate their use.

14th La. An. 842, 82;
12th La. An. 747;
32d La. An. 915;
37th La. An. 67.

The city not being the owner of the property in question, in no event could be held liable for the tax; the statutes did not intend that any assessment should be made against streets or public squares, and the commissioners in so doing were in excess of their authority, as the tax was to be levied against property and its owners; the title of ownership was necessary in order to make any person liable to the charge; property, the fee of which was not in any person, natural or artificial, known or unknown, in which category streets and public squares would be included, was evidently not in contemplation as subject to assessment, for the terms of the statute, fixing the liability upon the *property and the owner*, in the order named, may reasonably be deemed to have intended, that for the collection of the tax recourse should be restricted first to the property, and afterwards to the owner, in the event that the assessment was not collected in full out of the former; the justification of the tax, being the supposed benefit conferred upon the property by the increase of its value, the suggestion naturally arises, that the collection of the tax is primarily confined to the property which is intended to be improved; it *could* be, for such cases are disclosed here by the evidence, that the entire property might be taken for the tax, and leave a balance unpaid, that is to say, the owner would have lost his property altogether, and still be in debt; on the other hand, the sale of the property, and such cases are also disclosed by the record, might pay the tax many times over, in which event there would be no necessity of recourse against the owner; a local assessment being in its essence a tax on land, and not against persons, is naturally payable first from the property itself, and the personal liability, if there be any, should be asserted only for any balance remaining unpaid, after the property has been exhausted; these considerations tend conclusively to the result that there is no personal liability, or any right to take execution against the owner, until the property is first exhausted, and then only for unpaid balance.

Applying this to the asserted liability of the city, as a debtor for the taxes on streets and public squares, how would the city stand in the issuance of an execution, for the sale of its streets? What would be the effect of a suit for a mandamus to compel the city to pursue such a course? How would result, the efforts of the warrant holders themselves, if they were in a position so to do, to sell the streets and pub-

lic squares for the payment of the taxes? Going further, imagine a number of drainage tax judgments, and every street in the city named upon the assessment rolls put under seizure by the sheriff, and the farce of its advertisement and adjudication to a purchaser persisted in, what kind of a title would such purchaser receive, and what manner of possession would the sheriff give under his adjudication?

Referring, again, to the rule that local assessments are upheld on the ground that they confer a peculiar and special benefit upon certain property, in which other property does not participate as regards public streets and public squares, of which the entire people have the free use and enjoyment, what special benefit would they receive from the drainage, apart from other property?

They are not in commerce, and have no value which can be measured in money; they belong to no one person, not even to the city herself, but are the property of every inhabitant. See Neenan vs. Smith, 50th Mo. 525, 528.

Hartford vs. West Middle States, 45th Conn. 462.

The city in no event could be held as a trustee of the assessments and judgments against herself; as to these she was a debtor and not a trustee; besides which, it will be seen that the court has dealt with the city's defense as to these assessments, as though it was based simply upon the exemption from taxation of public property, in the general sense.

It may be premised, that the defense set up is not simply that the public property in question, is exempt from taxation, but also that it was not intended by the act of 1858, to be assessed for drainage taxes; your Honors will observe that this part of the city's defense, on this part of the case, is not noticed in the opinion.

The claim that the city is a trustee, is based upon the provisions of Act No. 30, of 1871, and more particularly upon those of section 9 of that act.

Defendant insists that by that statute, it is not made a trustee of the assessments against public property; that no such intention is expressed or implied by any language that it contains; on the contrary, from the circumstance that it is made a trustee as to assessments against private property, and no mention is made of those against public property, its trusteeship as to the latter is completely negatived; and, further, that the failure to mention assessments against streets, etc., either expressly or by inference, may be evidence that they were deemed invalid by the legislature; on the other hand, it is clear, that the only assessments turned over to the city, were those against private owners alone; this is shown by the duties imposed upon the city; the act says, section 9, page 78, that the Board of Administrators "be and are hereby authorized and directed to collect from the *holders of the property* within said districts, the balance due on the as-

sessments, as shown by the books of the first, second and third drainage districts, under the acts of March 15th, 1858, and March 17th, 1859, and the several acts supplementary and amendatory thereto, which said *assessments* are hereby confirmed and made exigible." Italics are ours.

The same section says (page 77), that the Board of Drainage Commissioners "shall transfer to the Board of Administrators of New Orleans, all moneys, assessments, and claims for drainage in their hands or under their control, * * * a true statement of the claims of said Drainage Commissioners against the city, to be adjudicated and settled out of any money *collected* by the city."

The claim that the assessments against the city, were included in the assessments placed under the control of the board, is seen to be entirely without force, when, reading further, it is ascertained, what the city was directed to do with these assessments, namely, to collect them from *holders of property* within the districts, language, which by no construction could mean anything else, than that the assessments so turned over, were those against the owners of private property, from whom the city was to make collections; the city surely was not to collect from herself as a holder of property; for a debtor to collect from himself what is due to his creditor, and pay it over to the latter, is an incongruity, the imagination is unable to picture; if this mode of thought were pursued with reference to the holders of private property, the act would have declared it their duty to collect from themselves and pay over to the city; nor is the "true statement of the claims of said Drainage Commissioners against the city, to be adjudicated and settled out of money collected by the city," a description, which would comprehend the assessments against the city, as included in what the board was to receive; the assessments, had prior to 1871, passed into the judgments so strongly relied upon by complainant, and hence, there was nothing to be adjudicated upon; and in any event, the assessment on streets was not to be paid out of money collected by the city from any one, but out of its own hands.

It is no answer to say that the transfer was for the purpose of collecting these amounts; this is limited to assessments against the holders of property, in which category the city could by no interpretation be included; nothing could be accomplished for the warrant holders, by making the city transferee of the judgments against herself; it was indicated in the clearest manner that the assessments against public property were not contemplated by the act of 1871; whether because they were regarded as invalid, or for any other reason, need not be determined; the exigencies of defendant's case are sufficiently met, in this regard, if the fact be, that the assessments against streets, squares and property of a like character, were not, as complainant insists, and the Court of Appeals declares, confirmed and made exigible by the act of 1871; the true construction of that statute, harmonizes with peti-

tioner's argument, that the act of 1858 did not intend that such property should be assessed; that the act of the commissioners in placing it upon the rolls was arbitrary and without legal effect, and that the judgments of homologation all on their face purporting to be rendered in accordance with the statutes authorizing the assessments, could have no greater effect than the statutes and assessments themselves; there would be as much authority for the commissioners, to have placed upon the rolls, property situated outside of the drainage districts, as there would be to place thereon, property within them, but not of the character which the statute intended to be assessed.

With regard to the declaration in the opinion, that the drawing of the warrants against the drainage fund, composed largely of these very assessments and judgments, operated as an estoppel to deny their legal existence, it is respectfully submitted, assumes against defendant the entire matter at issue; the warrants were drawn against the drainage taxes, and in no particular was it undertaken to define what they were, nor is there any fair implication as to what taxes composed the fund; to draw a warrant against drainage taxes, without specification as to the property which is assessed, and the persons who are involved therein, while it might assume the existence of a fund of some sort, leaves entirely at large, any question as to whether assessments against public property, formed any part thereof; the physical existence of certain rolls on which streets and like property, were assessed, does not, in the faintest degree, import anything as to their legal effect, or that they had any; during the many years from 1858 to 1871, the city had not paid one dollar of these so-called assessments, and during that period the municipality had enjoyed prosperous times; no warrant holder ever attempted to enforce against her, any right based upon the city, or the streets, being liable for drainage taxes; Van Norden himself, in 1872, instead of, by mandamus or other proceeding, attempting to realize from the city, the large sums now imagined to be due for assessments on public property, and thus realizing in cash to the extent thereof, contented himself with obtaining relief by the city's bonds, which, by the act under which they were issued, he was required to take at a discount; instead of these assessments being confirmed by the act of 1871, as far as any fact can be declared and acquiesced in by silence and inaction, the non-liability of the city was established, not only by its own conduct, but by that of every holder of drainage warrants; if, in 1876, as is declared in the bill, with reference to the failure of the city to prosecute the work of drainage, shown by the evidence of Brown to be due to the lack of means, it had an unlimited power of taxation, it is extraordinary that Van Norden, who at that time was a large holder, both of work and purchase warrants, abstained, for the purpose of compelling payment of the judgments against her, from any attempt to enforce the exercise of this power, by appropriate legal proceedings.

The assumption of the opinion, that the Supreme Court of Louisiana has held the city liable for assessments made on the area of streets, if scrutinized, is seen fo be altogether unfounded in fact, so far as any application to the present case is concerned.

As to the first case cited, that of the Draining Company, 11 An. 338, it may be premised by saying that the question of liability of streets, etc., to local assessment was not before the court, which, as to this question, decided nothing. But in order to be certain, it would be well to subject the opinion of the court in all its parts to the closest scrutiny.

The first point raised, was that the charter of the company was unconstitutional (see page 339), the claim of unconstitutionality being based upon several grounds set out in detail, the first of which, namely, that the charter imposed taxes upon a portion of the community only, for a work beneficial to the public at large, was sustained, and there the whole matter would have ended, had it not been that a rehearing was granted in the case.

On the rehearing the court held, first, that as the legislature had the power to drain the swamp in the rear of the city by its own agents, it had also the power to do it through the intervention of a company created for that purpose; second, that the charter of the company was not in violation of article 124 of the constitution of 1852, which provided that the citizens of New Orleans should have the right to appoint the several public officers necessary for the administration of the police of the city; third, that the mode of paying for the work done by the Draining Company, was not in violation of article 123 of the constitution of 1852, or of article 127 of the constitution of 1845, which provided that taxation should be equal and uniform throughout the state (see pages 372 and 373); fourth, that the charter of the company was not violative of article 105 of the constitution of 1852, so far as it provided, that vested rights should not be divested, unless for purposes of public utility, and for adequate compensation previously made; as to this point, however, the court took occasion to say (p. 373):

"We have not understood from counsel, that there are any cases in which the property has not been so far benefited by the work done, as to be increased in value more than the cost of the work assessed. Were this not the case, the property of each proprietor, to the extent of the difference between the increased value, and the cost of the work assessed to him, would be taken for a purpose of public utility without adequate compensation previously made, and consequently there would be a violation of the provisions of article 105 of the constitution."

It is proper here to observe that the principle thus announced by the court, is identical with that declared by act 67 of 1877 (see page

106), attacked by complainant as being an impairment of the obligation of his contract; the act of 1877 says that the true intent and meaning of all drainage laws of this state, where liens and privileges are recorded against the property requiring drainage, are, that under the same no assessments or judgments can be collected, until after there had been conferred upon the property such improvement as will effect drainage, equal in value to the assessment exacted from the property; in this view the act of 1877 would have introduced no new element or principle, by which complainant's rights were affected; the principle declared by the act of 1877, was announced by the Supreme Court in the Draining Company's case in 1856, two years before the adoption of the first statute under which complainant asserts his rights.

Proceeding, however, with our effort to show that in the case discussed, nothing was said as to the liability of streets and other public places for the drainage assessments, the decree in favor of the company was attacked (p. 375), because the citation was by publication, and did not amount to a notice; the court held that the legislature could determine in what manner parties could be brought into court, and that such a notice was valid.

It was next contended, that the estimate of the cost of the drainage was not in conformity with the charter, but this the court held was cured by the judgment, and had been acquiesced in by the parties, who had daily seen the work upon the land in progress, and had made no objection or remonstrance.

It was further contended that the company could not recover for any work done on section 2, after the first of January, 1849, the date when it should have been completed; this contention was rejected by the court, which affirmed the judgment of the district court denying the company compensation for work done after a subsequent date, that is, May 10th, 1849.

The next contention concerned the matter of the allowance of interest, as to which the judgment of the lower court was amended; the homologation of the tableau was opposed again (p. 376), on the ground that the amount should be reduced by reason of the delays of the company in prosecuting the work; this contention was rejected.

It was next contended unsuccessfully, that the work as regards section 2 of the drainage area, was not promptly done, in that said section, was not isolated from other part of the city.

Further grounds of opposition concerning the expenses of cutting the wood and timber, standing on section 2, the manner of the charging of interest, and the mode of assessment, were all disposed of by affirming the action of the district court.

We have been at pains to go through the whole of this decision, in order that the minor and incidental references to the matter of

streets, was dealt with by the court, after it had disposed of all the oppositions before it. It does not appear that the assessment against streets, was put at issue by the pleadings of any party before the court; certainly, the city was not there, as it is here, opposing the inclusion of the streets in the land to be assessed, and the only reference to the subject of streets, is found in the conclusion of the court's comment upon one of the effects of assessing lands, of no value, at the same rate as those of great value; one feature of such a method mentioned by the court in the concluding paragraph of its opinion, is the imposing upon the city, for the streets, a large portion of the expense; it is obvious that this random expression, by which it is intended only to describe the consequence, if a certain view were taken of the case, and appearing in a mere fragment of the opinion, not adjudicating upon the claims of any person before the court, in any event not upon the city herself, cannot be considered as an authority of even the slightest weight, in support of *the* proposition that the streets were liable to assessment. The subject is spoken of only as a consideration supporting on equitable grounds, the assessment in the same manner, namely, by the superficial foot, of all property, whatever might be the differences in value; it was put by the court only as an illustration to show the justice of such a mode of assessment, and obviously, its correctness was not questioned and decided, but, on the contrary, assumed.

Nor does the case of Marqueze vs. The City of New Orleans, 13th A. 319, contribute in the slightest degree, to the solution of the issue, whether or not the streets and public squares were liable to assessments under the drainage laws in question here; the liability of the city in that case did not depend upon the general liability of such property to assessment, but grew out of the express contract made by the city with Marqueze, to level, grade and shell Claiborne street, from St. Bernard avenue to Elysian Fields street, on one side of which was a middle or neutral ground, which did not belong to any of the front proprietors; in payment of the entire work, the city delivered to Marqueze, the contractor, bills against the property-owners on the side of Claiborne street opposite the neutral ground, which included the entire cost of the shelling; by section 119 of the city's charter, however, the owners of real estate could only be made to pay the cost of street paving when they owned the property fronting on both sides of the pavement; the effort of the city to throw the entire cost of the paving upon the front proprietors who owned the property only on one side of the street, was an attempt to force upon them the liability which the city charter said they should not bear; the city itself having made the contract with Marqueze, and in payment therefor having given him an order on the property-holders, which to the extent of one-half was not enforceable, it was required to make good the price,

which it had contracted Marqueze should receive for his work; the city could be held liable, irrespective of its alleged ownership of the neutral ground; the property-holder not being the owner of this portion, could not be called upon to pay as such owner; the Supreme Court must not be understood as declaring what is denied by the Civil Code, and by numerous decisions rendered prior to the Marqueze case, that the city is the owner of a public street or public square; on the contrary, this is expressly negatived by the language of the court, which is found on page 320, as follows:

"The city is obliged to make and pay for one-half of the paving in the case at bar, not only from the effect of section 19 of the city charter, but also because the middle ground on Claiborne street is the property of the city, and intended and dedicated as a public promenade, for the public use and enjoyment."

It is thus that the city's relation to the property is defined; if the property is dedicated to public use and enjoyment the city cannot, in the sense of the drainage acts of 1858 and 1859, be its owner, because over such she has no power of alienation, nor can she subject it to privilege or mortgage.

It must not be understood that the imposing upon the city, of the liability for the shelling in the Marqueze case means, that she must pay the assessments upon the streets in the present case; in the former case her relation to Marqueze was one growing out of a contract, while here there is no contract between herself and the Boards of Commissioners who levied the assessments upon the streets; under the statutes at issue here, there could be no assessment to affect any person, directly or remotely, except the owner of the property, and so far as this term is used in the opinion of the court in the Marqueze case, it is clearly not in the same sense in which it is found in the statutes of 1858, 1859 and 1861; the context of the Marqueze decision shows clearly the meaning of the city's ownership therein spoken of; it was an ownership of the property which was dedicated to the public use, which is the same kind of ownership described by the articles of the Code and the decisions, which class the city, not as owner, but simply as the administrator of such property.

It will be observed that of the five members of the court but three concurred in the opinion; Mr. Justice Buchanan, having an interest in the suit, took no part in the decision, while Mr. Justice Spofford dissented from that part of the opinion, which gave countenance to the claim that the city was the owner of the neutral ground, and which subjected the latter to any part of the cost of paving; Mr. Justice Spofford concurs in the decree on the ground that the city warranted the validity of the claims against private owners given to the contractor, and that the contractor having by judgment been defeated in the collection of his claims, the city was liable to him for the same.

The case of Correjolles vs. Succession of Foucher, 26th An. 362, so far as the facts are concerned, is similar to the Marqueze case, except that the defendant's attorney in that case, the Hon. Edward Bermudez, counsel for defendant, and late Chief Justice of the Supreme Court of the State of Louisiana, did not go the length of claiming that the title to the neutral ground on St. Charles street, was in the city, but contented himself with the claim that it was either in the Carrollton Railroad Company or *the public;* it will be noted in the 26th Annual case, while it is declared that the case is controlled by the Marqueze case, in construing the latter, the court says that it was there held that the middle ground of Claiborne street belonged to the city as a *locus publicus*, and the city was bound to bear one-half of the expense of constructing a road on the north side of Claiborne street; to say that the neutral ground belonged to the city as a *locus publicus* is to say that it did not belong to the city in ownership, of which a *locus publicus* is not susceptible; as to public places the city has simply a right of administration, the fee being in the people; we are, therefore, verified by the 26th Annual case in our construction of the Marqueze case to the effect that it was not intended by the latter to say that the neutral ground on Claiborne street was susceptible of ownership by the city; the determination of the Marqueze case being, that the ground belonged to the city and was dedicated to the public use and enjoyment, terms which when construed together mean nothing more than the definition of the city's possession of such property under the articles of the Code; the 26th Annual case brings out conspicuously this feature of the Marqueze case, where it declares that the middle ground of Claiborne street belonged to the city as a *locus publicus*, which means that the city was its owner in the narrow and restricted sense, of an administrator for the public good and use.

The constitutional amendment of 1874 (see acts 1894, page 56), prohibits the city from increasing its debt in any manner, or in any form, or under any pretext, after the first of January, 1875; it forbade the drawing of any warrant or other order for the payment of money, except against cash actually in the treasury; it contained a proviso that the amendment should not be so construed as to prevent the drawing of drainage warrants in favor of the canal company or its transferee for work done under Act No. 30, of 1871, *payable exclusively* out of drainage taxes; it is difficult to conceive by what exercise of ingenuity, the scope and effect of the amendment could be misinterpreted; its evident purpose was to prevent the city from creating any debt, bonded or floating, in addition to that already existing on the 1st of January, 1875; it absolutely forbade the drawing of any warrant, except such as could be immediately paid with cash on hand for that purpose; and the permission to draw warrants payable out of the drainage tax alone, only brings in bolder relief, the inhibition against

the drawing of any warrant, or order for the payment of money, which, in form and effect, was payable otherwise than out of the cash on hand, or out of the drainage taxes.

The amendment, as interpreted by the Court of Appeals, has furnished an authority, instead of announcing a prohibition, against, the city incurring additional debt; it may be added, in passing, that the claim that defendant's case has not been fully understood by the Court of Appeals is completely vindicated by its remarks in reference to this part of it; it is said: "It would seem that the authority to issue warrants against the drainage fund, after that date, necessarily implied an affirmation of the right of the city, to the completion of the drainage work then in progress, and imposed a corresponding duty on the city, to collect and apply the drainage assessments to the payment of the warrants;" when it is considered that the "work then in progress" was being conducted, not by the city, but by Van Norden, as transferee of the company, and the city was under no duty,—nay, had no right to carry on the work, or to meddle with it in any manner at all, and that she had no connection with the same, until some two and a half years afterwards when she took charge of it under the act of 1876, the failure of the defense to make the facts of its case appreciated by the court, is lamentable indeed; the other inference of the court, that the right to draw warrants imposed a corresponding duty to collect and apply all drainage assessments to the payment of the warrants, is pregnant with the suggestion that it had no such duty to perform as to the assessment against itself on streets and other public property, since as to these, there was nobody to collect from, the city herself being, at most, their debtor, if they were valid, and her duty, if any at all, founded upon the assessments, being to *pay* and not to *collect;* in the language which follows, the court has disregarded all distinction between the assessments against private property, or the owners thereof, for which the city is said by the bill to be responsible by reason of her failure to collect, and the assessments against the city herself, as to which, at most, she is a debtor, and her duty, if any at all, simply to pay; the wide difference and important distinction between the status of each of these classes of taxes, are completely annihilated by the court, when it says, in its remarks on the amendment of 1884, that, "these taxes, being liabilities of the city, cannot by any cause or reason be included in the clause prohibiting the increase of the debt of the corporation, without imputing to the authors of the constitution an intent to defraud those who might deal with her, under the invitation of the constitution."

If the amendment has succeeded in making anything clear, it is that the drainage assessments there spoken of are not liabilities of the city; on its face, the language repels any such meaning or inference. The assessments against the city alone, could by any possible construc-

tion be deemed liabilities of the city, when the amendment was to go into effect; the assessments against private property were not and had never at any time been considered as liabilities of the city, but were obligations of private property, and of the owners thereof; the amendment, of course, did not obliterate any liability which the city was already bound to, but surely it could, in no event, convert assessments against private property into obligations of the city; the so-called assessments on streets and squares, etc., as we have argued elsewhere, were never at any time binding upon the city, and altogether without effect, as being made without any authority of law; the intent of the constitutional amendment was, that the city should not, by any process whatever, become a debtor of more than she owed on the first of January, 1875; therefore, this act of purchase in 1876 could not, in any of its results, whether by reason of misconduct on the part of the city or otherwise, be made to assume any form, by which the city, in consequence, would be a debtor of one dollar in excess of her indebtedness on January 1st, 1875; the ground upon which the city is said to be made liable herein, is that she abandoned the work of drainage and neglected to collect the tax, but if the amendment be given its proper effect, the city could not, by such negative conduct of acts of omission or neglect, do that which she was forbidden to do in the most positive and solemn manner; she could clearly make no contract in violation of the amendment, and, hence, could not, by inaction, accomplish that which she was positively and directly forbidden to do.

Such limitations upon the power of a municipality to incur indebtedness have always been upheld and have never been disregarded, upon the plea, either of convenience or necessity.

The constitutional amendment of 1874 prohibited the city from adding to its debt under any pretext whatever. The prohibition is sweeping and extends to any increase of debt in any manner or in any form; it matters not how necessary the work of drainage may be, or may have been considered. The purpose of the amendment was to strip the city of any discretion whatever as to the increase of its debt. The debt could not be augmented, however necessary in the city's judgment. Of all of this Van Norden had full notice when he sold to the city.

It matters not how great may be the necessity, real or apparent, for the city to incur debt beyond the constitutional limit, the prohibition, and not the necessity of the expense, controlls. This is well settled by authority. A limitation of indebtedness imposed by constitution or charter, extends to all forms of debt, bonded or floating, and embraces all transactions which may involve or affect indebtedness of any kind, beyond the limit allowed.

In Prince vs. Quincy, 105 Illinois, 138, the city undertook to con-

tract for the construction of water works, for a sum which, added to its existing indebtedness, exceeded the constitutional limit of five per cent. on its taxable property. It was claimed that a water supply was a necessary requirement of the city, and its provision was an item of ordinary current expense incident to the city's power of government and administration. While the necessity for work was admitted, the court held the contract to be void, as beyond the constitutional power of the municipality. The court declared that the rule applied was well settled in Illinois and admitted of no exception, citing several instances in support of its conclusion.

In Sacket vs. New Albany, 88 Indiana, 473, under a constitutional provision, in all respects similar to that of Louisiana, limiting the indebtedness of municipal corporations to two per cent. upon its taxable property, recovery for the price of a system of fire alarm, the necessity and importance of which is readily seen, was denied, on the ground that the contract, if permitted to stand, would create an indebtedness exceeding the limit. As in the case just cited, it was there contended that the contract should be upheld on the ground of the absolute requirement of a system of fire alarm for the protection of property, but this was found insufficient to sustain the contract, in view of the limitation of indebtedness.

In Valparaiso vs. Gardner, 97 Indiana, 1, under a similar provision of the constitution, a like rule was affirmed, although in the particular case the contract in question was held not to be a debt, and hence removed from the limitation of indebtedness.

In National Bank vs. Independent District of Marshall, 39th Iowa, 490, the contract of a school board for the construction of a school house, a purpose directly within the powers of the board and obviously a necessary object for the performance of its duties, was declared void for the reason that its payment would be in excess, over and above the indebtedness permitted by the constitution.

In Davis vs. Des Moines, 71st Iowa, 501, a local assessment for the construction of a sewer was contested by a property owner, on the ground that its cost would increase the city's debt, in violation of a constitutional provision by which it was limited to a certain amount. It was held that the assessment, which was to be paid by the owners of the adjacent property, was not a debt of the city, by reason of which it was not affected by the prohibition. On this ground the assessment was upheld, but the rule that all municipal indebtedness in excess of the constitutional limit was void, however necessary the public work for which it was contracted, was null and void, was declared.

This case is instructive in the present controversy. The drainage assessments as levied under the prior statutes, are fully recognized by the constitutional amendment of 1874. In this form they are not

affected injuriously by the amendment; but any process by which they are to be converted into absolute debts of the city, is in the teeth of the amendment, by which the city is prohibited from increasing her debt after the 1st of January, 1875, *in any form or in any manner or under any pretext.* In the face of such absolute injunction, the failure of the city to complete the work of drainage and collect the assessments, could not make it the debtor of the warrants sued upon. The amendment intended that not one dollar should be added to the city's debt no matter what the pretense. It would amount to little, if mere neglect or failure of duty, could bring about the very result, which it was the purpose of the amendment to make impossible.

In Scott vs. Davenport, 34 Iowa, 208, the city was expressly authorized by its charter to construct a water works plant. Here, too, the necessity of a water supply was imperative; yet, notwithstanding the express charter authority and the necessity of the work, the contract was annulled on the ground that it created an excess of indebtedness over and above the constitutional limit.

In Council Bluffs vs. Stewart, 51 Iowa, 385, proceedings, for the opening of a street, the work to be paid for by an issue of bonds, were set aside on the ground, that the bond issue would increase the municipal debt beyond the constitutional limit. The puplic requirements which necessitated the opening of the street, were considered insufficient to remove the contract from the constitutional rule, the court holding that the limitation applied to all debts of every description, for whatsoever purpose contracted.

In the decisions mentioned, there are cited many cases upon the question at issue, they are respectfully referred to the consideration of your Honors.

See also Read vs. Atlantic City, 49 N. J. L., 558.

In Appeal of City of Erie, 91 Pennsylvania St., 398, a contract for the construction of a market house, a necessary adjunct of municipal government, was attacked on the ground, that its price would add to the city's debt, to an extent that would exceed the limit placed upon it by the constitution. The contract was held void on this ground.

The decision of the courts of last resort of Illinois, Iowa, New Jersey and Pennsylvania, above cited, are in full accord with the jurisprudence of this court upon the same subject.

In Buchanan vs. Litchfield, 102 U. S. 278, bonds were issued in payment for the erection of water works; the bond issue with the existing municipal indebtedness exceeded the constitutional limit of five per cent. upon the taxable property of the city. Upon this ground the bonds were held void.

In Litchfield vs. Ballou, 114 U. S. 190, the contractor who built the water works just mentioned, sued to recover the money expended in their construction. The bonds, as is seen, having been decreed in-

valid upon the ground, namely, that the contract violated the constitutional limit of indebtedness, the relief sought was denied. The prime necessity of the work in question, as a means of supplying the city's inhabitants with water, was one of the conditions of the suit, but this in no respect hindered the court from maintaining the constitutional limitation of indebtedness.

In Doon Township vs. Cummings, 142 U. S. 366, bonds in excess of the constitutional limit were issued. They were, however, to be used in retiring previously existing debts, which were within the limit, and hence in the result there would have been no increase in the debt. This court held, however, that there would be an undoubted increase in the interval between the issue of the bonds and the taking up of the old debt, and this violation of the constitution, though temporary, and as the initial step towards paying a lawful debt, could not on that account be excused (page 372); the bonds were declared void.

The Supreme Court of Louisiana has had frequent occasion to construe and give effect to the constitutional amendment of 1874, and in every instance has maintained its most rigorous enforcement.

It has been said that this amendment "was a perfectly constitutional provision, operating *in futuro* only, and absolutely binding, not only upon the City of New Orleans, but on all persons dealing with the city. No clause or commentary can make its meaning more perspicuous. It rendered it impossible for the city, by any voluntary act, to increase her debt, in any manner, form, or under any pretext, and all persons were fully charged with notice that whatever services they might render, and whatever supplies they might furnish, that they could never become creditors of the City of New Orleans, because she was incompetent to contract additional debt." Taxpayers' Association et al. vs. City of New Orleans, 33 Louisiana Annual, 571.

In another case the court says: "We have rigidly enforced the constitutional amendment of 1874 as to debts created after its passage." Taxpayers vs. New Orleans, 33 Louisiana Annual, 568; State *ex rel.* Marchand, 37 Louisiana Annual, 19 and 20.

See also State *ex rel.* Gaslight Company vs. City of New Orleans, 37 Louisiana Annual, 438, citing Eager vs. New Orleans, 36 Louisiana Annual, 937.

State *ex rel.* Wood, Board of Liquidation, 40 Louisiana Annual, 413.

The pleas of prescription, in so far as their discussion is concerned, were ignored by the Court of Appeals; as to the assessments against the city, which had been merged into judgments, the plea was unquestionably good; there are two classes of taxes for which the liability of the city is sought to be fixed; first, those against private property; and, second, those against streets, public squares and property of a like character; as to the first, from their origin they were

charges against private property assessed and the owners thereof, they were not in any sense liabilities of the city; the contention of complainant is that the city has become liable for these assessments by reason of her failure to collect them and her abandonment of the drainage work; this failure and abandonment occurred in 1876, when the constitutional amendment was in force, which, by its very letter, was an insuperable obstacle to the city becoming the debtor of these assessments, by any process whatsoever; the second class of assessments, those against public property, are charged against the city as the primary debtor.

In defense it is claimed, that there was no authority under the act of 1858 for the making of these assessments; that, although, as a matter of fact, such property was listed by the commissioners, that this was a mere act of power, without warrant of law, and hence devoid of legal effect; it is argued, however, by the complainant, that this objection cannot now be made because the assessment rolls have been homologated, have been merged into the judgments by which they were homologated, and any question as to their illegality has been thereby foreclosed; as to this, it may be said that the judgments could have no greater force than the statutes which they were rendered to carry into effect, for the purpose of execution by collection through the sheriff, of the assessments intended to be authorized; whatever the statutes mean, the judgments mean; the latter are interpreted and limited by the statutes, which declared the liability which the judgments were designed to fix; the soundness of this position is maintained by the judgments themselves, which expressly declare that they are rendered in accordance with the acts of 1858 and 1861, by which reference the statutes are imported into the judgments as part thereof; and if there be doubt as to their meaning and effect, the judgments declaring that their purport and significance, are to be the same as the statutes in question, they are necessarily controlled and limited by the latter; the doings of the commissioners, and the homologation, extending no further than the authority derived from the statutes; hence, if the assessment of public property, was beyond the power of the commissioners conferred by the act of 1858, the judgments did not, nor were they intended to, enlarge the authority of the commissioners.

In the attempt to escape the effect of such interpretation of the laws, as would make the assessments on streets, public squares, etc., null and void, by the claim that such question is closed by the judgments of homologation, the complainant falls into another difficulty, equally if not more serious.

If the decrees of homologation are judgments, so far as to close all matters of defense, which might have been urged before they were rendered, it is impossible to save them from the effects of other rules applying to judgments; one of these is that established by article

3547 of the Revised Civil Code, by which judgments are prescribed in ten years, saving, however, to the judgment creditor or any other *person interested in the judgment*, by a timely suit for revival, brought within ten years from its rendition, to save the judgment from prescription; this latter provision would do away with all pretense of the city utilizing its status as a so called trustee, to allow the extinguishment by the lapse of time, of the judgments which its duty was, to keep alive; aside from the consideration that a suit by the city, as plaintiff, against itself as a defendant, for the revival of a judgment against itself would be a startling anomaly, the remedy of the warrant-holders relying in part on these judgments for payment, was wholly within their own hands; as persons interested in the judgments, they were, under article 3547, of the Revised Civil Code, authorized to have brought suits for the revival of the judgments, themselves; this course possessing the merit of possibility, while the process of the city suing herself would be difficult to conceive; if the judgments have, therefore, perished by the lapse of time, the responsibility lies not at the door of the city as is contended, but is chargeable to complainant, or his assignor, and his fellow warrant-holders.

This defense is disposed of by the Court of Appeals with the single remark, that the act of 1876 created an express trust in the city, by which the city undertook as trustee, to collect and apply the drainage assessments to the payment of the warrants; and that the statute of limitation is not set in motion until the trustee has disavowed the trust, and notice of its repudiation had been brought home to the *cestui qui trust*.

When it is considered that the act of 1876, says nothing whatever as to what composed the drainage fund, whether it was assessments against private persons and property, or assessments against streets, public squares, etc., and the city, or both, it is difficult to understand the assumption, that the act made the city a trustee of all character of assessments; if any part thereof, as they then stood upon the books, were invalid in law, there was nothing in the act of 1876 which could make them valid; there is no suggestion that the act of 1876 was to have any curative effect, or to make valid that which was before invalid.

We have seen that by the act of 1871, there was turned over to the city and she was directed to collect, only the assessments on private property, and it would be strange indeed, if the act of 1876 was intended to so enlarge the city's responsibility, as to charge her as trustee of the assessments against herself, and to have done so merely by implication.

And conceding, for the sake of argument, that the position of the court, altogether at variance with the law, is justified, its answer to this part of complainant's case would still perish, when tested by its

concluding portion, to the effect, that prescription is suspended until the trustee has disavowed his trust, and knowledge of such repudiation is brought home to the *cestui qui trust.*

The bill charges and the record shows, that the work of drainage was abandoned in 1876, the effect of which, according to the bill, was to make the taxes unenforceable; it would be a very violent presumption that such conduct by the city, attended with all the public notoriety surrounding a municipal act of such important and far reaching consequences, could have been done without coming to the knowledge of Van Norden, who had received three hundred thousand dollars of the warrants, to be paid out of the drainage taxes alone, which could not be collected unless the drainage system was completed.

To suppose that Van Norden, or the other warrant-holders, if, by that time, he had parted company with any of the warrants, would have been in ignorance of the conduct of the city, which is bitterly complained of in the bill, would be a severe tax upon credulity. This suit was instituted November 26th, 1894, about eighteen years after the city had ceased to prosecute the work of drainage, and consequently repudiated her trust, so called; the lapse of ten years alone would be sufficient to sustain the plea of prescription of the judgments against the city, even if she occupied the grotesque position assigned her by the Court of Appeals—that of trustee of a debt, if due at all due by herself.

To sustain the imprescriptibility of the assessment judgments, the court cites the case of Southern Insurance Company vs. Pike, 32d Louisiana Annual, 1037; McKnight vs. Calhoun, 36th Louisiana Annual, 408; if there be any resemblance between these cases and the one at bar, or any analogy between the propositions therein involved, and those concerned here, it is not revealed by the most searching examination; the slightest examination of these authorities will make this clear.

Regarding the statement of the opinion that under Insurance Co. vs. Pike, 32 Louisiana Aunual, 403, the trust created by the act of sale was continuing and executory, and under it the city undertook, as trustee, to collect and apply the drainage assessments to the payment of the warrants, it may be said that the authority of the Pike case, and the others cited, are not questioned, but they are altogether without application in the present instance; the city here does not plead prescription against her accountability as trustee of the drainage taxes due by private individuals; she claims that the judgments against herself have been extinguished by prescription; we have argued that as to these judgments she is not a trustee, but a debtor, and all debts are subject to the statute of limitation in this State; the Pike case touches no question bearing any resemblance to the one at issue; Pike took possession of all the books, accounts, assets and property of

the Southern Insurance Company, with the obligation to collect and account for the assets; an action for an account could never be prescribed, except from the date that he repudiated the trust; this is no authority against the position that judgments against the city, like judgments against any other person, are subject to the law of prescription.

The Succession of Farmer, 32 Louisiana Annual, 1037, and McKnight vs. Calhoun, 30 Louisiana Annual, 408, are cited by the court to show that the city cannot claim a release from its indebtedness to the drainage fund, by pleading its own neglect to revive the judgments in proceedings to that end, when necessary; we have demonstrated, as we believe, the utter impossibility of the city bringing a suit against herself for the revival; on the other hand, the plain, positive, textual provisions of the Code gave the warrant-holders the right to bring such suits themselves; in view of which it is deemed not disrespectful to say, that the court has fallen into the error of charging the city with neglect, on account of her failure to do what she could not do, and has given no effect whatever to the fact, that the power to keep the judgment alive was at all times in the hands of the warrant-holders.

The Farmer and McKnight cases simply hold that the prescription of a debt is suspended, so long as there exists between the creditor and debtor such relation as will prevent any suit for the debt; there was nothing here to prevent the drainage warrant-holders from having their judgment against the city executed, or to have saved them from prescription by bringing suits to revive; the dissimilarity between the cases cited, and the cause here is conspicuous.

As to these judgments the city is not a trustee; the Pike case and those of like character, have no reference to the prescription of debts or judgments dischargeable in money, but even if they did, and the city be considered to any extent in a fiduciary relation as regards the judgments, this would not deprive the city of the benefit of prescription; not only under the articles of the Code themselves, but their construction by the Supreme Court of Louisiana; it has been held by the Supreme Court of the United States, that "no laws of the several States have been more steadfastly or more often recognized by this court from the beginning, as rules of decision in the courts of the United States, than statutes of limitations of actions, real and personal, as enacted by the legislature of a State, and as construed by its highest court." Bauserman vs. Blount, 147 U. S. 647, 652, citing numerous authorities; also Beal vs. Oden, 163 U. S. 73.

In concluding its remarks upon the subject of this plea, the court below says, that it is doubtful whether statutory assessments of the character in question are subject to any prescription at all, and cites Reed vs. His Creditors, 39 Louisiana Annual, 115, which, in turn, cites

State vs. Jackson, 34 Louisiana Annual, 176, and Davidson vs. Lindop, 36 Louisiana Annual, 707, to the effect that prescription established by the Civil Code does not apply to taxes; this part of the opinion again recalls the lamentable failure of the defendant to make its case clear.

The answer is barren of any plea of prescription leveled against the assessments themselves. The prescriptions pleaded are, first, that applying to the warrants sued upon, which is an "effect transferable by endorsement or delivery," any action upon which, is barred by the prescription of five years; Revised Civil Code, Art. 3540; second, that of ten years, which bars any and all personal actions of any character whatsoever, established by article 3544, of the Revised Civil Code.

These two prescriptions, it will be observed, apply to the action and not to the grounds of liability, which it is sought to enforce; they do not concern themselves with the strength or weakness of the title; the action, however otherwise well founded, cannot be brought after the lapse of time stated in each case; the inquiry does not extend to the merits of the action in any respect; these articles bluntly declare, that after the lapse of five years in one case, and of ten years in another, the action cannot be brought.

It is unnecessary to say more than to point out to the court, that these two prescriptions are too widely different from, to be confounded with, any plea of prescription against the assessments, which this suit is brought to enforce.

The other prescription—the one immediately under discussion, that of ten years—applying to judgments, concern the latter alone, and not the assessments which the complainant insists have been merged and lost in the judgments themselves.

A slight examination of Reed against His Creditors, State vs. Jackson, and Davidson vs. Lindop, will inform the court that two things cannot be more widely apart than the principles upon which the cases were decided, and that which they are cited by the court to uphold.

Whether or not the assessments in question are subject to prescription at all, which the court says is not certain, but only doubtful, the decisions of the Supreme Court of Louisiana cited to show that they are not, it is respectfully suggested do not at all sustain the proposition; they were interpretations of special statutes, altogether different in character from those imposing the assessments here; they concerned general taxes, and not local assessments; the case of Reed vs. His Creditors, held that city taxes levied under section 20 of the charter of 1870, were, by its *express terms*, imprescriptible; that state taxes, levied under the provisions of Act 37, of 1871, and Act 36, of 1869, found by the court to contain language of similar import to that contained in the city charter, were not subject to the laws of prescrip-

tion; in both cases the taxes were held imprescriptible, because the statutes under which they were levied, said so; far from sustaining the position that the drainage taxes were originally imprescriptible, they would rather tend to the contrary, because the law of 1858 contains no express exclusion of the law of prescription, while the statutes under consideration in the Reed case were held to save the taxes from prescription, because it was so said, in terms.

Davidson vs. Lindop, 36th Louisiana Annual, 765, is also an interpretation of section 20 of the city charter of 1870, containing a clause which expressly made the taxes imprescriptible; the Jackson case, 34th Louisiana Annual, 178, was likewise a construction of special statutes, under which general taxes were levied, presenting no point of resemblance to the assessment acts under consideration here; under article 3547 of the Revised Civil Code, in ascertaining whether or not the prescription which operates as a release from debt, should be applied, the law regards simply the lapse of the requisite time; that in such a prescription, unlike that by which property is acquired, neither good faith nor a just title is necessary; this would not, as seems to be supposed, involve the monstrosity of freeing an agent or trustee, to whom property has been confided for another, from the obligation of accounting for the same, after the lapse of a certain period from the inception of the agency or trusteeship; in such case the obligation of the trustee would not be to pay money, but to account for a trust. Prescription, it is true, as to the accounting, would not begin to run until the trustee had placed himself in antagonism to his trust, by setting up a title inconsistent with, or repudiating it; but here we have no such question to deal with; the city pleads that she has been released from any debt founded on the drainage judgments against her, by the lapse of ten years from their rendition; we are told that the city herself should have revived these judgments; but, as has been shown hereinbefore, this, it was impossible for the city to do, had she so desired, for she could not sue herself, and occupy the position of both plaintiff and defendant in the same suit, while, on the other hand, the warrant-holders were at full liberty, under the articles of the Code, to have brought their own suits for revival.

It should be borne in mind, however, that, as this contest, and all the transactions relied upon by complainant, began and ended in the State of Louisiana, they are governed by the laws of that State; under these laws, good faith is not required to enable a party to invoke the prescription which operates as a release from debt; articles 3528, 3530, 3550 of the Revised Civil Code; under the law of that State, the fact that a party is a trustee does not deprive him of the benefit of the prescription *liberandi causa* in a case like the present; we have already shown, that the cases of Insurance Company vs. Peake, Suc-

cession of Farmer, McKnight vs. Calhoun, are so different from the present case, both in point of fact and the law to be applied, that they are no authority in this controversy.

On the other hand, it is established by decisions of the Supreme Court of Louisiana that a party occupying the supposed position of trustee, which the city is driven into by the opinion of the Court of Appeals, may plead prescription against liability resulting therefrom, under conditions similar to those found here.

That the city was the trustee of the drainage judgments, charged with the duty of collecting them, and consequently cannot be heard in any respect to impeach their validity, and hence is estopped to set up that the judgments against it are prescribed, cannot be successfully contended here; the law of prescription is found in the Civil Code, which is a statute of the State of Louisiana, as to the construction of which, the decisions of the Supreme Court of Louisiana control; in the case of Brown vs. Insurance Company, 3d Louisiana Annual, 177, the facts were almost identical with the present case; certain parties were directors of a corporation; among the uncollected assets of which, were certain stock subscriptions, due by the directors themselves; these were never paid, nor were any steps for their collection taken by the directors; in this condition ten years elapsed from the time the subscriptions became due, after which period, a judgment creditor of the corporation, which latter had become insolvent and passed into the hands of liquidators, garnisheed one of the stock subscribers, who was also a director; he set up that the obligation was prescribed; the court said that the directors had neglected to act in the matter, notwithstanding which, the creditors of the company were not without remedy; that they might have caused the company to be administered, and the necessary calls to pay the subscriptions made and enforced; that the prescription which operates as a release from debt does not require the debtor to produce any title, or that he should be in good faith (Revised Civil Code, article 3530); the neglect of the creditor alone operates the prescription; when he is present, and his silence has continued for ten years, the law presumes payment; that good faith not being required for that class of prescription, the relation which existed between the garnishee and the defendants, could be no obstacle to it; the court said it must hold, therefore, that the relations of the party under the contract or the charter, did not affect the general law on the subject.

In Wagoner vs. Philips, 22d Louisiana Annual, 152, it was held that article 3476 (now article 3510), to the effect that those who possess for others, and not in their names, cannot prescribe whatever may be the time of their possession, which, in substance, is the principle contended for by complainant here, namely, that the city as trustee cannot plead prescription of the judgments against herself, of

which she was the custodian, did not apply to the prescription which operates as a release from debt; that the presumption of payment resulted from the lapse of the necessary time, *juris et jure.*

It is contended, however, that there are decisions of the Supreme Court later in date which overrule, Brown vs. Union Insurance Co.; the decisions cited are the following, as to which it may be said that no one in the slightest degree impeaches the authority of the Brown case found in 3d Louisiana Annual; this is apparent from the slightest examination of the cases; these have already been discussed, but may be again reviewed in this connection.

The first is that of the Succession of Farmer, 32d Louisiana Annual, 1037; this case holds that as an administratrix cannot sue the succession she represents, prescription will not run against her on her claims against the succession as long as she is administratrix, because, being legally incapaciated from judicially enforcing her claim by the law, its prescription is suspended under the law of *contra non valenam prescriptio non currit;* see 32d Louisiana Annual, p. 1041; a dictum altogether foreign to any question involved here.

McKnight vs. Calhoun, 39th Louisiana Annual, 408, to the effect that where there is a debt due by an administrator individually to the succession which he represented, prescription is suspended during his administration; there is nothing in this case which touches the rule invoked by defendant; here the assessments are in the form of judgments, and the question is, whether those judgments were saved from prescription by the fact that they were against the city herself; in the McKnight case the only party having the right to sue for the debt was the administrator himself, and hence there would be a reason why prescription should be suspended; here, however, the case is widely different; the assessments being in the form of judgments against the city, an action to revive the latter could have been brought by any one interested in the judgments; this, according to the textual provisions of article 3547 of the Revised Civil Code; therefore, the reasoning of the McKnight case is of no pertinence in the present case; in the former, the succession and its creditors were without remedy; here the remedy of the drainage warrant-holders was complete and perfect; they had the right to bring a suit to revive the judgments; they were not left entirely in the hands of the city, as the succession in the hands of the administrator was in the McKnight case; the city could not *sue herself* for the revival of the judgments, but the drainage warrant-holders had their remedy in their own hands, while in the McKnight case the situation was different; the creditors were without remedy, except such as could be availed of, by the administrator himself.

Parish Board of School Directors vs. The City of Shreveport, 47th Louisiana Annual, 1310, is equally wide of the mark; it holds

that where the defendant had collected taxes for school purposes, carried as such on the annual budget of expenses, that they must be applied to the purposes specified by the budget, and that the city could not plead prescription of one year against the taxes thus collected; in the present case, the defendant has collected no taxes, and does not plead prescription against any demands for funds which are in her possession, received for purposes designated by law; such would have to be the facts, for the 47th Louisiana Annual case to have any controlling influence; the position of the defendant is simply that the drainage warrant-holders have allowed judgments against her to prescribe, and it is no answer to say that she, as trustee, cannot plead prescription; she is not pleading her own laches or neglect, but that of the drainage warrant-holders themselves, who had the right, under article 3547 of the Civil Code, to revive the judgments against the city; having failed to do so, prescription has run, and the judgments are extinguished.

Nor is the case of complainant in any way strengthened, by its claim that the drainage assessments are governed by the law of prescription as concerns taxes levied for purposes of general revenue; and this cannot be more clearly demonstrated than by a reading of the two cases cited in support of that proposition; that of Davidson vs. Lindop, 36th Louisiana Annual, 766, declares that the city taxes for the years 1871 to 1879 are imprescriptible, and cites section 20 of the city charter of 1870, misprinted 1879, the effect that all taxes levied under that charter are declared a lien and privilege upon the property until they are fully paid; it is sufficient to say that the drainage assessments in question here were not levied under the city charter of 1870, and hence that Davidson vs. Lindop, refers to a subject, entirely apart from any issue presented here; nor is Reed vs. His Creditors, 39th Louisiana Annual, 115, of any more pertinence; this case simply holds the laws of prescription are *stricti juris*, that at most they constitute a bar to the assertion of rights judicially; that they are neither self-acting nor self-enforcing; that prescription proceeds upon the theory that one in whose favor a right once existed, has lost his judicial recourse for its enforcement, by reason of his own neglect; that such an equity cannot arise in favor of the subject against the sovereign, by reason of the failures of her officers to perform their duty; this case may, in brief, be considered as holding that the law of prescription in the Civil Code has no application to the State or city as a bar to the *collection* of taxes due to either; it requires nothing more than to say that no such question arises here; the drainage judgments are not in favor of the city or the State, but, on the contrary, *against* the former; they exist in favor of the holders of drainage warrants, private persons, and the question here is the reverse of that before the court in the Reed case; there it was, whether prescription could be pleaded by

a private person against the claims of the city or State for their taxes; the issue here is whether the city herself can set up the bar of prescription against judgments against herself for the benefit of private persons; it is manifest that the two cases touch each other at no single point, and present no single feature in common.

There is a serious ground of complaint against the Court of Appeals, in its not disposing of the plea of *res adjudicata*, made by the answer; this plea, if well founded, would have terminated the controversy; but defendant is left by the opinion, in ignorance as to whether or not the consideration of this plea, formed any part of the court's deliberations; in the opinion, it is passed by in silent contempt; but it is respectfully submitted that an examination of the facts upon which it is based, will show conclusively that it should have been maintained.

The plea of *res adjudicata* is based upon the fact that in the case of Peake vs. New Orleans, James Jackson, by intervention, joined with the complainant Peake in the relief which he sought; Jackson sued upon a judgment of law obtained in the Circuit Court; reference to the petition in that case shows, that the warrants of Jackson were not "work warrants" or "construction warrants," as were those sued upon by Peake, but "purchase warrants," issued in payment of the city's purchase, made in 1876, under the legislative act of that year; and identical in all respects with those sued upon here by Warner, the complainant, the decree in the Peake case was against complainant; as well as against all those who joined him by intervention, and hence the present suit of Warner is based upon the same cause of action as that set out by Jackson's intervening bill in the Peake case, which, along with the original bill, was dismissed by the Circuit Court.

The presence of the purchase warrants, as an issue, in the Peake case, appears in bold relief in the opinion of the Circuit Court in that case, found in 38 Federal Reporter, 782; the point was there made that a part of the warrants there involved were purchase warrants, and for that reason stood upon a higher footing than the work warrants sued on by Peake, complainant; but the Circuit Court, through Judges Pardee and Billings, held that both classes of warrants were alike, and the city's liability on the purchase warrants, was rejected along with that on the work warrants.

The purchase warrants being all alike, that is to say, all issued for the price of the city's purchase—all parts of the same transaction—the status of one is the status of all; and the judgment adverse to Jackson, as regards his warrants, fixed the status of the entire series, including those sued on by complainant, as regards their being the source of any liability of the city; it would be a remarkable result that if Jackson, by reason of his having made an appearance in the

Peake case, should have no right to the payment of his warrants, while complainant, standing aloof, should obtain here a decree entitling him to payment for the same kind of warrants, which Jackson failed upon in the Peake case; whatever is true of the purchase warrants sued on in the Peake case, is likewise true of those sued on in the present case; that the difference set up between the two classes of warrants was an issue in the case is shown by the citation thereof from 38 Federal Reporter; but it is sufficient to say that a claim against the city, founded upon purchase warrants, having been rejected in the Peake case; the same claim, made here, should meet with a like fate.

The action of the court in decreeing that the city was the debtor of the drainage warrants sued upon, is without pleading of the complainant to sustain it; the bill proceeds upon the theory that the city has made herself responsible for the drainage taxes assessed against private property and is the primary debtor of those assessments against streets, public squares, etc.; it nowhere asks that the warrants themselves, independent of the taxes, be declared a liability of the city; it simply asks that the warrants be paid out of the taxes for which the complainant seeks to make the city liable; the error of making an absolute decree against the city is only exceeded by the more objectionable part of the decree, which allows interest at eight per cent. per annum from July 7th, 1876.

Act No. 16, of 1876, provides for no interest on the warrants, neither does the act of sale and purchase, for which the warrants were given, as a price; it is true, that the act of 1871 declares that the purchase warrants shall be issued in the same form and manner as those theretofore issued to the transfer company, under act of 1871, for work done, but this, by no reasonable construction, could be held to include the allowance of interest; nor does the circumstance that the warrants themselves provide that they shall bear such interest after their presentation, non-payment, or their endorsement, showing these facts, the administrator of accounts or of finance, by signing the warrants, could thereby produce no effect not authorized by the statute of 1876, as all of their doings were obviously referable to the statute under which they were acting, beyond which they were wholly without power; the effect of this allowance of interest would be to more than double the amount of the warrants; this will not be countenanced unless within the clear intendment of the law, which, manifestly, does not go this far.

Respectfully submitted,

SAMUEL L. GILMORE,
City Attorney.

BRANCH K. MILLER,
Solicitors for Petitioner.

No. 172.

Brf. of Gilmore & Miller for Petr. (on reha

Office Supreme Court U. S.
FILED
DEC 27 1899
JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 172.

Filed Dec. 27, 1899.

CITY OF NEW ORLEANS, PETITIONER,

versus

JOHN G. WARNER, RESPONDENT.

Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF FOR PETITIONER ON RESPONDENT'S APPLICATION FOR A REHEARING.

Your Honors having granted respondent the right to file a petition and briefs for a rehearing herein, on the question of interest alone, it is deemed not improper by petitioner to lay before the Court its views upon this subject.

The Court has found in its opinion that there was no presentment of the warrants sued upon for payment, such as its terms and statute required; and that there was no waiver of such presentment. In the view of respondent, there is no basis afforded, either by the act of 1876, under

which the warrant was issued, or the contract made under its authority, for the allowance of any interest at all.

The provision of Sec. 3 of Act 16 of 1876 is that the warrants, in which the price of the purchase thereby authorized, was to be paid, "shall be issued in the same form and manner as those heretofore issued to the transferee of the said company, under Act 30 of the acts of 1871, for work done." It will be observed that Sec. 6 is silent as to the amount of price to be paid, also whether or not the same should bear interest, save so far as the item of interest may be imported into the contract by the reference to the act of 1871.

Turning to this statute we find that nothing is there provided as to the form of the warrant, save that it shall be drawn by the Administrator of Accounts on the Administrator of Finance, in such denominations as might be required by the president of the Canal Company. This is followed by the provision making it the duty of the latter official to pay the warrant on presentation to him, in case there be any funds in the city treasury to the credit of the Canal Company, but should there not be sufficient funds to cash the warrant the administrator is required to endorse upon the same the date of presentment, after which date the warrant should bear interest at the rate of 8 per cent. per annum, until paid. The concluding language of the section provides that this condition shall be set forth in the form of the warrant.

Under the law of Louisiana any obligation to pay conventional interest is invalid, unless evidenced by written agreement. Testimonial proof of the same is not permitted in any case. Revised Civil Code, Article 2924, paragraph 4.

Reid vs. Duncan, 1st La. An. 267.

Bayley & Pond vs. Stacey & Poland, 30 La. An. 1212.

The law requiring that the evidence of a promise to pay

interest must be in writing, it is a fair inference that the evidence relied upon must be clear, convincing and free from doubt. It is respectfully submitted that the ground upon which interest is herein claimed is not sufficient to sustain complainant's contention; the notarial act which shows price to be paid (see transcript, p. 100) is silent as to interest, the stipulation being simply that the sale is "made and accepted for and in consideration of the price and sum of $300,000, payable in drainage warrants;" ordinance 3539 (Trans. p. 104), authorizing the mayor to make the contract for the city, and fixing the price of the same, declares, "that upon the execution of the aforesaid notarial agreement, the Administrator of Accounts be, and he is hereby authorized and directed to warrant upon the Administrator of Finances for $300,000 in drainage warrants, in *full settlement*, as above provided;" the ordinance likewise containing no provision as to the payment of interest.

The only ground upon which the warrants could be considered as bearing interest would be that a stipulation for its payment properly enters into the "form and manner" of drawing them, as directed by Sec. 6 of the act of 1876; this however is borne out by the Record.

If there be any doubt whether or not petitioner is bound for the payment of interest on the warrants sued upon, this would be sufficient for it to go free from any obligation of that character, as by the express provisions of article 1957 of the Revised Civil Code, in a doubtful case the agreement is interpreted in favor of him who has contracted the obligation.

It seems reasonable to assume that if the Legislature contemplated that the price paid should bear conventional interest, which in the case of natural persons is never paid except where expressly stipulated, that it would have placed the matter beyond any doubt at all by following the invariable course in transactions between individuals, namely, by

providing in so many words that the price to be paid was to bear interest at a certain rate; it is only, however, by reference to the act of 1871, to ascertain in what form the warrants were to be drawn, that the matter of interest can be imported into the contract, if it has any place therein at all.

It will be noted that the Act of 1871 contains first, a direct positive and substantive declaration, that the warrants therein described are to bear interest at 8 per cent. from the date of their presentment for payment, and this is followed by the subordinate provision that this condition shall be set forth in the form of the warrant; it is difficult to understand why the Legislature, if it intended that the city should be charged with interest on the purchase warrants, that it should have left such intention to be understood by a mere reference in general terms to the form in which the warrants were to be drawn; this may have left many persons, at the time, under the impression that such an important feature of the contract was not intended to be left to interference or construction, and hence, wholly negative the allowance of any interest at all; especially so in view of the law of the state, which denies all conventional interest, where the same is not expressly stipulated in writing; to leave the discovery of an agreement to pay interest to a scrutiny of the form of the warrant, with no express reference by the Act of 1876, at all to the subject of interest, is not in harmony with the care and wisdom commonly attributed to legislators; the payment of the interest was no less important than the payment of the price itself, and in the present case, if interest be allowed from the day the warrants were presented, it would exceed by about one fifth the price itself; it would be more reasonable to interpret the "form and manner" of drawing the warrant, mentioned in Sec. 6 of the Act of 1876, as referring to what it would naturally mean; that is, the formal requisites of the warrant, as a means of ob-

taining the payment of public money, namely, that it should be drawn by the Administrator of Accounts on the Administrator of Finance; it should not be extended to such serious matters of substance as the payment, in the way of interest, of any amount beyond the price agreed on.

The law of Louisiana regarding an agreement to pay interest, as of such importance as to make its existence depend solely upon written evidence, it is fair to say that even where the evidence is in this form, it should be clear, convincing and free from doubt; the obligation to pay interest here is to be constructed from the language of a general reference to an act of the legislature, which provides that an express provision of that act requiring the payment of interest, shall be incorporated in the form of the warrant; in the Act of 1871 this provision as to the form of warrant follows the other substantial and independent declaration that interest shall be paid; the substantial and serious element is provided before the formal.

It will be observed that the right of the Administrator of Finance to make the endorsement of the date of presentation is conditioned upon their being no funds in the treasury available for its payment. It is only as a consequence of this fact that he has any authority to make the endorsement. Its existence or nonexistence is jurisdictional, and the endorsement in any event should recite the fact which is a condition precedent to any right to make it.

Respectfully submitted,

SAMUEL L. GILMORE,

City Attorney.

BRANCH K. MILLER,

Solicitors for the City of New Orleans, Petitioner.

DECEMBER, 1899.

No. 640. 172

Assignment of Errors.

Office Supreme Court U. S.
FILED
MAR 14 1899
JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1898.

Filed Mar. 14, 1899.

No. 640.

THE CITY OF NEW ORLEANS, PETITIONER,

vs.

JOHN G. WARNER.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

ASSIGNMENT OF ERRORS.

First. That the United States circuit court of appeals for the fifth circuit is and was without jurisdiction to hear and determine this cause; that the case involves the construction and application of the Constitution of the United States, especially section 10 of article 1, and also the fourteenth amendment thereof, prohibiting all legislation impairing the obligation of contracts, as is shown by the averment of complainant contained in the twenty-fourth paragraph of his bill.

That, independent of the said averment, this case is one which involves the construction or application of the Constitution of the United States.

That in this case certain laws of the State of Louisiana

are claimed to be in contravention of the Constitution of the United States, to wit, that by the said twenty-fourth paragraph of complainant's bill it is averred that the act of the General Assembly of the State of Louisiana, No. 48 of the year 1877, excluding certain lands from all liability for drainage taxes and canceling and annulling all judgments for the drainage of said lands, and the legal proceedings pending therefor, and the act of the General Assembly of the State of Louisiana, No. 67 of the year 1877, declaring that no judgment for drainage taxes should be collected until the property had been benefited to an extent equal to the drainage taxes imposed, and section 42 of act No. 20 of the General Assembly of the State of Louisiana for the year 1882, by which all laws providing for the drainage of the city of New Orleans or portions thereof and the collection of drainage-tax assessments are unconstitutional, null, and void, because repugnant to the Constitution of the United States, especially section 10 of article 1 and the fourteenth amendment of that Constitution, prohibiting all State legislation impairing the obligation of contracts and protecting the rights of property.

Second. That the court erred in holding that all of the defenses set up in the answer had been ruled upon adversely by the Supreme Court in the case of John G. Warner *vs.* City of New Orleans, reported in 167 U. S., page 467.

Third. That the court erred in holding that the only fact in dispute between the parties is the question of responsibility for the alleged defects in the drainage plans; that the answer shows that there are other distinct issues made here which formed no part of the pleadings when the demurrer was heard, namely, the non-liability of the city for assessments against streets, public squares, and property of a like character, the effect of the amendment to the constitution of the State of Louisiana of 1874, and the plea of prescrip-

tion and *res judicata;* that while the case of Peake *vs.* City of New Orleans was pleaded in the demurrer as *res judicata* of the present case, the showing on the demurrer in this respect was widely different from that made at present, namely, the record of the Peake case on the demurrer was not before the court, the plea could only be sustained by evidence, and hence the court could on the demurrer have no knowledge of its scope. In any event, the part of the case of Peake relied upon to sustain the plea of *res judicata* was the intervention of James Jackson and the plea therein, which could by no process whatever be brought to the notice of the court on the demurrer, in consequence of which the overruling of the demurrer cannot be considered as overruling the plea of *res judicata.*

Fourth. That the court erred in holding that the defects in the drainage plan were attributable to the fault of the city.

Fifth. That the court erred in holding that the city was trustee as to the so-called assessments and judgments therefor against streets, squares, and public property of a like character.

Sixth. That the court erred in holding that the city, by drawing warrants against the drainage fund, was estopped to deny the existence and validity of the said assessments against public property, and if the court intended to hold, independent of the estoppel it declares, that the said assessments on streets, public squares, and property of a like character were valid, or were made by any authority of law, or had any binding effect against the city, it also erred in this regard, and if it reached the conclusion that any validity or binding force was given to said assessments by the judgments of homologation set out in the bill, it also erred.

Seventh. That the court erred in finding that the cases of The New Orleans Drainage Co., 11 An., 338; Marquez *vs.* City of New Orleans, 13 An., 319; Correjolles *vs.* Succession of Foucher, 26 An., 362; Barber Asphalt Paving Co. *vs.* Gogreve, 41 An., 259, were any authority on the question of the liability of public property to local assessment, or that the decision of those cases had any controlling or other influence on the issues involved here; likewise as to the case of McLean *vs.* City of Bloomington, 106 Ill., 209.

Eighth. That the court erred in holding that the assessments on said public property constituted a lawful debt of the city, which must be discharged by the exercise of the power of taxation.

Ninth. That the court erred in holding that the constitutional amendment of 1874 was not a complete defense to this suit; that while the said amendment permitted the issue of drainage warrants, the same, by the express terms of the amendment as to their payment, were restricted to drainage taxes alone, the same amendment allowing this mode of payment, "and not otherwise." This was an express denial of any power in the city, by any process whatever, to become the absolute debtor of the said warrants; and in any event the proviso of the amendment as regards the drainage warrants extended no farther than to those issued under act No. 30 of 1871, and by no interpretation could be held to include warrants issued under the subsequent act, No. 16 of 1876; that the said assessments against public property were not confirmed by act No. 30 of 1871, such confirmation as may have been given by said act having reference exclusively to assessments against private property; that the authority to draw drainage warrants allowed by the amendment does not imply, as is declared by the court, an affirmance either of the validity of the assessments against streets

and other public property or of the right of the city to proceed to the completion of drainage work then in progress, the said work at the time of the adoption of the amendment being exclusively in the hands of Van Norden, transferee of the Mississippi and Mexican Gulf Ship Canal Company, to the doing of which the city had no relation whatever, and to which it was a perfect stranger until its purchase under the act of 1876, some two years and a half after the amendment was adopted; that the city was absolutely without power to increase her debt by the purchase of 1876 or by any of the consequences thereof, and the effect of the constitutional prohibition could not be avoided by an error of law or otherwise.

Tenth. That the court erred in overruling or refusing to maintain the plea of prescription as to the assessments against public property and the judgments homologating the same; that as to these the city was not a trustee, but at most, under complainant's contention, a mere debtor, and even this is distinctly denied by defendant; that whether or not the said assessments and judgments are prescribed is to be determined by the law of prescription in the State of Louisiana; that the statutes of limitations of the several States and the interpretation given them by the highest court of the State in question are binding as rules of decision in the Federal courts; that the laws of prescription of the State of the Louisiana and their construction given by the supreme court of this State, so far as they operate as a release from debt, depend for their application solely upon the lapse of time required; that good faith or bad faith, trusteeship, or other like matters are not considered. The mere passing of the time of the statute, without further condition, constitutes a complete defense. Hence, even if the city, as erroneously held by your honors, was a trustee, the plea of prescription as against the said assessments against public property and the judgments therefor should

have been maintained; that the case of Insurance Company *vs.* Pike, 32 An., 483, is wholly inapplicable to this case, as concerns the said assessments against public property and the judgments therefor; that the city has not averred in its answer that it has constantly endeavored by suits and otherwise to collect these assessments, but, on the contrary, the answer expressly denies that they had or ever had any validity or binding force; that the averments of the collection and accounting for taxes set up in the answer are limited in terms to the assessments against private property; therefore the conclusion of the court that the city by its efforts to collect has affirmed the trust as to the assessment against herself is error; that the city does not plead her own neglect to have kept the judgments against herself alive by bringing suits for their revival; that as a matter of fact she could not have done so, it being in law inconceivable that she as a plaintiff could bring a suit against herself as a defendant to revive a judgment against herself; that this would not leave complainant without a remedy, as by article 3547 of the Revised Civil Code any person interested in a judgment may bring a suit for its revival; so that it is the warrant-holders and not the city who have allowed the said judgments to prescribe. The city was absolutely without power to revive them, while the warrant-holders were free to have done so. In consequence of this and other considerations the cases of the Succession of Farmer, 32 An., 1037; McKnight *vs.* Calhoun, 36 An., 408, to the effect that the prescription of debts due by a succession to its administrator and *vice versa* is suspended, while the administration continues, are without application here; that whether or not the assessments as originally made are subject to prescription, and defendant insists that they are, they have, by the averment of complainant, passed into judgments, and by merger have lost their original character. That the judgments are subject to prescription is apparent from the textual provisions of article 3547, Revised Civil Code, the case of Reed *vs.* His

Creditors, 39 An., 115, citing State *vs.* Jackson, 34 An., 178, and Davidson *vs.* Lindop, 36 An., 767, construing, as they do, the particular provisions of special statutes presenting no feature in common with those presented here; the statutes interpreted by those cases differing *in toto* from those involved here, expressly provide that the taxes levied thereunder shall not be subject to prescription, and hence furnish no authority upon the question of prescription here at issue."

Eleventh. That the court erred in holding that the only remaining consideration which required its consideration, after having disposed of those preceding, was that of prescription; that defendant, besides the other defenses, had pleaded *res adjudicata*, based upon the opinion and decree of the United States Supreme Court and of the circuit court for the fifth circuit and eastern district of Louisiana in the case of James W. Peake *vs.* City of New Orleans, No. 11614 of the docket of the latter. The opinion of the Supreme Court in such cause is found in 139 U. S. Reports, page 323. (See Record, pages 22 and 23.) The opinion of the court did not dispose of this defense; it was not considered. It should have been maintained as a bar and defense to this suit.

Twelfth. That the court erred in holding that the city should not be allowed in any event the amount of its bond issue, described in the answer as a credit in her favor, on any amount which she might hereafter be decreed to owe; that while it has been held by the Supreme Court that the bond issue could not be so treated, the opinion of the Supreme Court was based upon the question submitted for its consideration in this respect, which was made up from the record of the case as it then stood, namely, on an answer and a demurrer. The record at that time necessarily did not and could not make the showing of facts which is now before the court, namely, that Van Norden, the vendor of the city,

received, either himself personally or through his employés, assignees, or transferees, the entire issue of the bonds, and hence could not plead ignorance of the fact that the drainage fund had been augmented to the extent of the issue of bonds; that this would remove the element of ignorance on his part necessary to constitute an estoppel as against the city; that while the finding of the Supreme Court that the bond issue could not be treated as a defense was on the demurrer, it does not extend to the exclusion of such defense under the evidence now disclosed by the record. The bill does not even aver that Van Norden was ignorant of the issue of bonds, but that he did not understand that its legal consequence was a diminution of the outstanding drainage fund, and that he did not anticipate at the time of the purchase that the city would make such claim. This, at most, would be an error of law, a lack of correct judgment as to the legal consequences of a certain act, against which the laws of Louisiana does not relieve.

It should be noted also that what the Supreme Court said was based only upon the status of the bond issue, as shown by your honors' certificate, and not by the averments of the bill, the former being much narrower than the latter.

Thirteenth. That in Peake *vs.* New Orleans, 139 U. S., 342, the Supreme Court held that the city had the right to abandon the work of drainage; that such an abandonment was no cause of liability to warrant-holders; that while the opinion was with reference to work or construction warrants, it is equally applicable to the purchase warrants sued on herein, and that the city should be exonerated from any liability based on the ground of the abandonment of said work, and in failing to give effect to this ground of the defense the court erred.

Fourteenth. That the court erred in holding that the city of New Orleans was a debtor of John G. Warner, the com-

plainant, in the sum of six thousand dollars, with eight per cent. interest, from January 6, 1876, or in any sum whatever.

Fifteenth. That the court erred in decreeing that the drainage assessments, including those against the defendant as assessee of streets, squares, and public places, as well as those against the owners of private property, constituted a trust fund in the hands of the city for the purpose of paying the claims of complainant and other holders of the same class of warrants issued under the act of sale from Warren Van Norden, transferee, to said city, under the authority of act 16 of the legislature of the State of Louisiana, approved February 24, 1876.

Sixteenth. That the court erred in holding that the city in any mode should be held to account for assessments of drainage taxes against streets, public squares, public places, or other property of a like character; that the court erred in decreeing that no offset should be allowed the city in any event for bonds issued in exchange for drainage warrants under the act of 1872.

Seventeenth. That the court erred in decreeing that complainant and those who had established their claims under the fourth clause of the decree would be entitled to an absolute decree against the defendant under any conditions.

Eighteenth. That the court erred in failing to give due effect to the appointment of a receiver for drainage taxes. This suit, if otherwise well founded, which is denied, should be directed against said receiver, and not against the defendant.

Nineteenth. That the court erred in not holding that the acts of the General Assembly of the State of Louisiana, Nos. 48 and 67 of 1877 and section 40 of act No. 20 of 1882, were full and complete authority and justification of the city of New Orleans for having abandoned the work of drainage, and also a full defense to the liability asserted in this suit against her for any non-collection of drainage taxes.

SAMUEL L. GILMORE,
City Attorney,
BRANCH K. MILLER,
Solicitors for Petitioner.

ANSWER AND BRIEF.

Filed Dec. 17, 1898.

UNITED STATES SUPREME COURT

OCTOBER TERM, 1898.

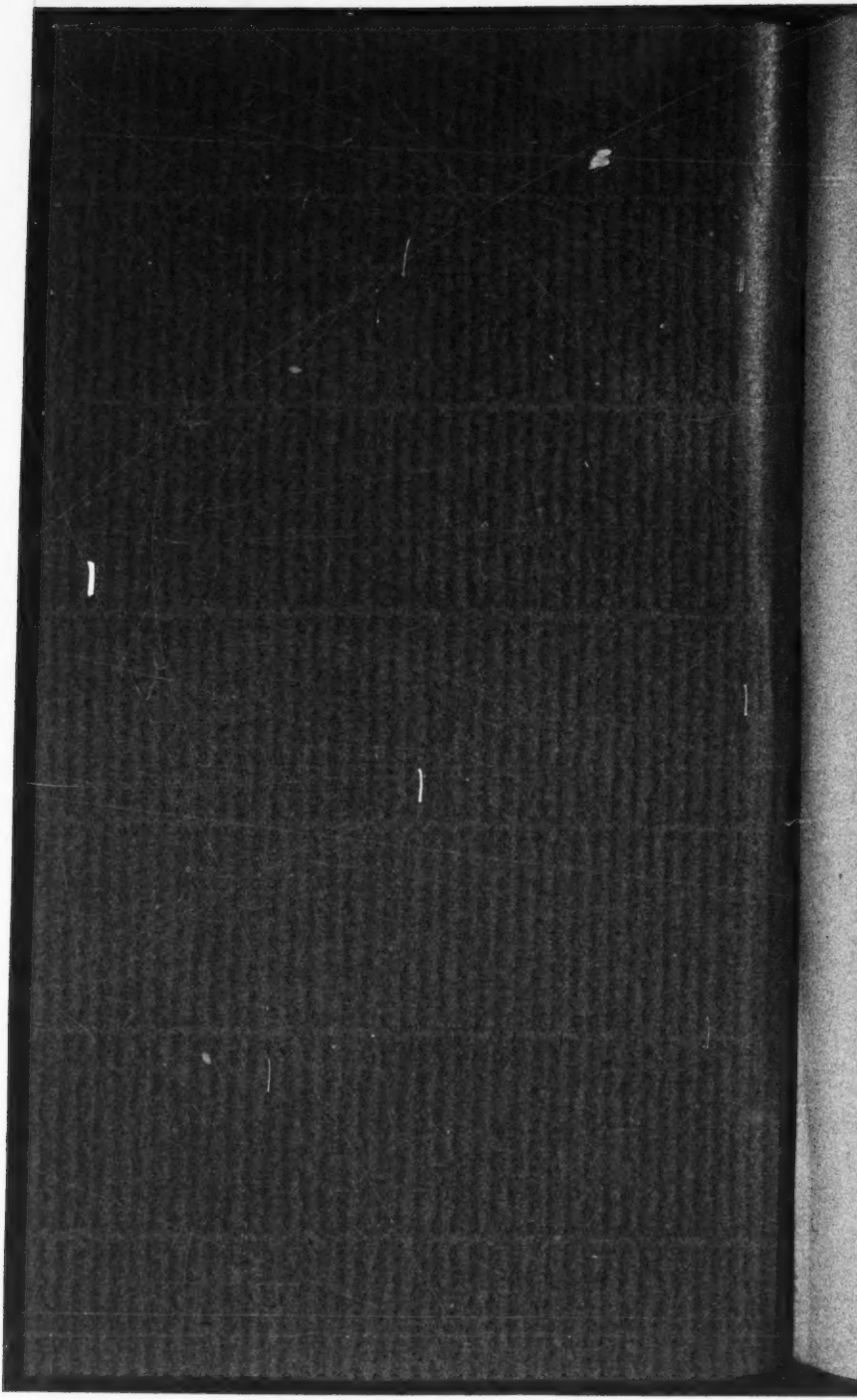
No. 640

THE CITY OF NEW ORLEANS,
Petitioner.

versus

JOHN G. WARNER,
Respondent.

RICHARD DeGRAY,
JOHN D. ROUSE,
WILLIAM GRANT,
Solicitors for John G. Warner.



SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1898.

No. .....

THE CITY OF NEW ORLEANS,
Petitioner.

versus

JOHN G. WARNER,
Respondent.

ANSWER AND BRIEF.

Now comes John G. Warner, made respondent in the petition of the City of New Orleans, filed in the above entitled cause, praying for a writ of *certiorari*, by his Solicitors, and for answer to said petition, or to so much thereof as he is advised it is necessary for him to specifically answer, says:

1.

Respondent admits that the proceedings had in the case of John G. Warner, Complainant, versus the City of New Orleans, Defendant, were and are substantially as set forth in said petition; he does not, however, admit that said petition accurately sets out the real issues tried and determined by the Circuit Court of Appeals; nor does he

admit that the decision of said Court is correctly stated, and in respect to these matters respondent prays leave to refer the Court to the record, and to his brief, filed in support of this answer, which he prays may be taken as a part thereof for greater certainty.

2.

Further answering this respondent avers that the decision of the Circuit Court of Appeals was and is in all respects correct, and he denies that any of the numerous errors complained of by petitioner are well taken, as will more fully and at large appear from respondents brief filed in opposition to said petition.

3.

Respondent further answering says that the decision of the Court of Appeals is based solely on the interpretation and effect of local laws, and although the questions determined are of some importance to the parties in interest, they do not involve any principle of law effecting the general jurisdiction of the Courts of the United States, nor involve the construction of the Constitution or laws of the United States.

Wherefore respondent prays that the application of the petitioner for a writ of certiorari be denied.

Respectfully submitted,

R. DeGRAY,
J. D. ROUSE,
WM. GRANT,
Solicitors for Respondent.

William Grant, being duly sworn, says that he is one of the Solicitors for the above named respondent, who is absent from the State of Louisiana, and that the statements contained in the foregoing answer are true, to the best of his knowledge, information and belief.

(Signed) WILLIAM GRANT.

Sworn to and subscribed to before me, this 29th day of November, 1898.

(Signed) N. G. GARLAND,
Notary Public.

BRIEF IN OPPOSITION TO PETITION PRAYING FOR A WRIT OF CERTIORARI, TO BE DIRECTED TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

It is very clear under the sixth section of the Act approved March 3rd, 1891, establishing Circuit Courts of Appeals, that the decree of said Courts are final in all cases and without reference to the amount in dispute, where the jurisdiction depends entirely on the diverse citizenship of the parties; and that the jurisdiction of the present case, so depends, has been decided on the 24th of October, 1898, in suit No. 336 (this case) of the October Term of 1898, when the appeal allowed herein on the contention that a construction or application of the constitution of the United States was involved, was dismissed. And it is equally clear that there is no right here contended for as

arising under any statute or authority of the United States, nor is there any question of Federal practice here involved, nor is it sought to reconcile any conflict in the decisions of Courts of Appeal, nor settle any question of general jurisdiction, but the only matter involved is the liability of a municipal corporation arising under a local statute. Surely this does not fall within the class of cases that it was intended should be removed under the sixth section of the Act of March 3, 1891, to this Honorable Court, to be here heard *de novo*, just as if it had been brought up on appeal.

But suppose we are mistaken in the above view of said Act of March 3, 1891, and the province of the writ of certiorari there provided for, the question then is, does the record show any error, or such error or errors, as would justify the writ prayed for herein and a rehearing in this Honorable Court? And here it must be borne in mind this case has twice been before this Court, once on questions propounded by said Circuit Court of Appeals, and decided, and reported in 167 U. S., page 467, (where the Court, in its opinion, laid down the principle on which the decree now complained of is based) and again on a motion to dismiss the appeal, decided October 24, 1898.

In trying to answer this question, (after making a statement of the case) we will take up and consider the various grounds urged for said writ in the petition filed herein, (none others can be considered, Hubbard vs. Tod. 171, U. S. 474) in the order in which they are presented, and at the same time discuss the City's liability not only on the assessments against herself duly reduced to judg-

mont, but also her liability for the assessments against individuals—also reduced to judgment—resulting from her conduct in reference to the same, also her liability with reference to both of the above assessments to the full extent of the drainage warrants drawn against said assessments under the act of sale of June 7, 1876, resulting from the unwritten and implied warranties in said sale, as well as from the written warranties in said act of sale contained.

The grounds urged are as follows:

First. Because the amount in dispute is large (25 paragraph of petition.)

Second. Because the Circuit Court of Appeals misapprehended, and wrongfully applied the decision rendered by this Honorable Court in Warner vs. New Orleans, 167 U. S., p. 467. (26 and 27 paragraphs of petition.)

Third. Because the decision of the Circuit Court of Appeals to the effect that streets, squares and other public property were subject to assessment to pay costs and expenses of drainage, and that this had been decided in Warner vs. New Orleans, is erroneous, and that the opinions of the Supreme Court of Louisiana, under which this conclusion is said to be justified, are based on entirely different statutes from those on which the present assessments are based and do not apply. (28th and 29th paragraphs of petition.)

Fourth. Because the Court erred in holding that the constitutional amendment of the State of Louisiana, going into effect on January 1, 1875, instead of being a prohibition against increasing the debt of the City of New Or-

leans, really was, by reason of the authority therein contained, an implied affirmance of the right to complete the drainage then in progress, and implied a corresponding duty on said City to collect the drainage taxes and apply the same to the payment of the drainage warrants of the class sued upon. (30th paragraph of petition.)

Fifth. Because the Court erred in disregarding the prescription of five years under Art. 3540 of the Civil Code of Louisiana, and the prescription of ten years under Art. 3544 of said code. (31st paragraph of petition.)

Sixth. Because the Court erred in not allowing the plea of *res adjudicata* based on the decision in Peake vs. New Orleans, 139 U. S., p. 342, (32nd paragraph of petition) the scope, meaning and construction of which, it is claimed, is peculiarly within the supervisory power of this Honorable Court. (36th paragraph of petition.)

Seventh. Because the Court erred in decreeing the City was the absolute debtor of the drainage warrants sued upon, while all the bill sought to obtain was an accounting of the drainage taxes, and that, in no event, could the warrants sued upon be considered the unconditional obligations of the City until it was shown all the taxes had been lost, misapplied or misappropriated, even if then, which is denied. (33rd paragraph of petition.)

Eighth. Because of the numerous error (19) set forth in the assignment of errors filed in the United States Circuit Court of Appeals with a petition for a rehearing in that Court. (34th paragraph of petition.)

Ninth. Because the Court wrongfully allowed 8 per

cent interest on the warrants sued upon. (35th paragraph of petition.)

Tenth. Beause the Court erred in not holding the contract of sale, under which the warrants in suit were issued, most unfair and inequitable because Van Norden, the seller of the property for which said warrants were given had bought the dredge boats and paraphanlia for $50,000 in 1872, and sold the same in 1876, after being in use for the intervening period for $300,000 in drainage warrants exceeding five times the amount paid for the same, and said sale was therefore a fraud on defendant. (37th paragraph of petition.)

STATEMENT OF THE CASE.

In June, 1876, Warner Van Norden was and for some time prior thereto, had been the owner of a large draining plant in the City of New Orleans, and the pledgee and transferee of a franchise granted by the Legislature of the State of Louisiana for doing drainage work.

While thus owner and transferee, as aforesaid, the legislature of said State, on the 24th day of February, 1876, authorized said City of New Orleans, in case it should be deemed advisable, to purchase the above plant and franchise, upon appraisement to be made, and when made to be paid for by drainage warrants drawn against drainage taxes, in the same manner and form as those issued under Act No. 30 of the Acts of the legislature of 1871.

The option and privilege thus granted, said City accepted, caused the appraisers therein provided for to be

appointed (to wit: the engineer of said City, R., p. 104) who reported the value and condition of the property, (R., pp. 91 to 97), and thereafter the Mississippi and Mexican Gulf Ship Canal Company, and said Van Norden, who was the transferee thereof, executed a bill of sale for said property to said City of New Orleans, and delivered the same, and said city, in accordance with said act granting her the privilege to purchase in case she deemed it advisable to do so, delivered to said Van Norden $320,000 of drainage warrants, drawn in the form and manner provided for under said Act No. 30 of 1871, $300,000 of which were delivered for the property purchased, and $20,000 in compromise for certain alleged misappropriation of drainage taxes collected by said city. (R., pp. 97 to 104.)

This bill of sale among, other things, contained this covenant, duly signed by said city, "not to obstruct or impair, but, on the contrary, to facilitate by all lawful means the collection of the drainage assessments as provided by law, until said warrants shall have been fully paid, it being understood and agreed by and between the parties hereto, that collections of drainage assessments shall not be diverted from the liquidation of said warrants and expenses as herein provided for under any pretext whatever until the full and final payment of the same. (R., p. 102.)

The drainage taxes against which said drainage warrants were drawn and delivered were created pursuant to the following Acts of the Legislature of Louisiana:

In 1858 an Act was passed providing for the drainage of certain portions of the Parishes of Orleans and Jefferson (which were divided into three drainage districts) and

directing that certain proceedings be had by certain commissioners to be appointed pursuant to said act to carry on said drainage, in certain Courts, to declare the land to be drained subject to a first mortgage lien and privilege for the cost of draining the same, and the said act provided that thereafter certain assessments should be levied by said commissioners in said districts, upon the superficial or square foot of the lands situate within the drainage districts, and that assessment rolls should be prepared fixing the amount to be paid by the owners of the land, upon which suit might be brought in case of non-payment, (Statutes pp. 1 to 6). In 1861 an amendment was passed to said law providing for a summary mode of collection of said assessments, under which said rolls were to be filed in certain Courts, certain notices issued, and that thereafter said assessment rolls should, by said Courts, be approved and homologated, which approval and homologation said law dec lared should be a judgment against the owner and the property issued (Statutes pp. 8 & 9).

Under these laws some of said mortgages had been delared, assessments made and the assessment rolls homologated prior to said Act No. 30 of 1871, which abolished said commissioners, transferred their rights, privileges, property and said assessments to the Board of Administrators of the City of New Orleans, who were subrogated to all the rights, powers and facilities of said commissioners, who were directed to collect the assessments already levied, and to levy and collect others provided for, but not then levied and collected, and further to levy and collect assessments on additional land by said act brought

within the limits of the territory to be drained, which additional land was called the Fourth Drainage District.

All the additional proceedings required to be had by said Administrators of the city were by them had, (R p. 10) and as a result the total amount of assessments levied and reduced to judgment that came under administration by the City of New Orleans, was $1,699,637.16, of which the large amounts, set out in the bill, were levied and reduced to judgment against the City of New Orleans on assessments on the area of the streets, squares and public property and these amounts and the judgments therefor are admitted to be correct in the answer (R. p. 189).

Pursuant to said Act of 1871 the drainage work was to be done by said Mississippi and Mexican Gulf Ship Canal Company (whose transferee the said Van Norden became, as aforesaid), for which drainage warrants were to be drawn, payable out of drainage taxes, and about two-thirds of the work provided for by said act was done by said Company and said transferee prior to said sale (R. p. 274), but only $229,922.69 of said assessments had been collected by said city at the time of said sale, of which $78,748.51 was in cash and of this latter $23,666.59 (R. p. 320) was used to pay drainage warrants, leaving the balance then due and to be collected on June 6th, 1876, $1,464,714.47, the balance of the warrants issued by said city for work done by said Company and said transferee having been taken up by said city by the issue of bonds prior to January 1, 1875, pursuant to the provisions of Sec. 13 of Act No. 73 of 1872 (Statutes, pp. 13 & 14), and which bonds amounted to $1,672,105.21 (R. p. 343), but this act made said bonds a

claim on said drainage taxes second in rank to said drainage warrants, for it in terms provided, "that all taxes collected for drainage and not required for payment of drainage warrants shall be devoted to the purchase of the lowest bidder of bonds issued for drainage."

In this state of affairs, and when the total amount of the above bonds exceeded the total amount of drainage taxes then uncollected by something like $200,000, the Legislature of the State, on the 24th of February, 1876, (Statutes, pp. 15 & 16), one year and nearly two months after the last bond had been issued, and when in law it had full knowledge of the amount of bonds then issued and of the taxes outstanding, passed the said act authorizing said purchase to be made and to be paid for by warrants drawn against said taxes.

The bill, after stating the above facts, sets forth, (1) That after said city acquired said plant and franchise and became vested with the exclusive right to do all drainage, sat down on the work of drainage and abandoned the work already done, thereby causing the Supreme Court of Louisiana to decide the assessments could not be collected; (2) That she openly and publicly violated her aforesaid covenant to facilitate the collection of said taxes, by her conduct, ordinances and proclamations advising the parties owing the same not to pay them; (3) That she will plead she has been discharged from all liability to account for the drainage taxes she has collected, and ought to have collected, as well for the assessments due by herself by reason of the issuance of the bonds above stated; (4) That the city never, prior to the above purchase, claimed that the

issuance of said bonds operated as such discharge, save in the case of Peake vs. New Orleans, on the 10th of March, 1886, (more than 9 years after she had acquired said plant and franchise); (5) That said Act of 1876 was an authority to make said purchase, as well as a legislative recognition that said drainage fund had not been discharged by the issuance of said bonds, and was an appropriation and dedication of so much thereof as was necessary to pay said purchase warrants without offset or impairment; (6) That said contract of sale was entered into by said Van Norden in consideration of the provisions of said Act of 1876, and its effects on his rights and remedies, that neither at the time of entering into said contract of sale, nor at the time of the delivery of said warrants, or at any other time, did said city disclose she would claim that the issuance of said bonds was a discharge of her liability to account for, and apply said drainage taxes, including those due by herself to the payment of said purchase warrants, that said Van Norden was ignorant that she would make such claim, and would not have made said sale if advised any such claim would be made, and that complainant, who is the owner of three of said purchase warrants, aggregating $6,000, and all other holders of similar warrants have been, by a writing annexed to and made part of the bill of complain, subrogated to all the rights and remedies of said Van Norden, growing out of said sale, in consideration of all of which complainant avers said city is estopped in equity and good conscience from pleading and maintaining said defense.

The bill prays for an accounting of said drainage fund,

and especially that the amount due by said City of New Orleans be decreed a trust fund in the hand of said city, applicable to the payment of said warrants.

To this bill a general and special demurrer was filed in the Circuit Court, alleging: 1st, want of jurisdiction, because it was said the bill showed the suit was based on an assignment of a chose of action of which the original assignor was a Louisiana corporation and a citizen of the State of Louisiana; 2nd, because the matters sought to be litigated had already been decided in favor of defendant in the case of Peake vs. New Orleans, 139 U. S. 342 and following; and 3rd, there was no equity or cause of action set out in the bill (R. p. 166).

The matters thus raised were heard in the Circuit Court and the bill was dismissed at complainant's cost, and an appeal was thereupon taken to the Circuit Court of Appeals for the 5th Circuit, (R. p. 170) and said Court, after full hearing certified the case to the Supreme Court of the United States on the following questions: (R. pp. 174 to 179.)

First. Is the City of New Orleans, under the warranties, expressed and implied, contained in the contract of sale of June 7, 1876, by which she acquired the property and franchise from Warner Van Norden, and under the averments of the bill, estopped from pleading against the Complainant the issuance of bonds to retire $1,672,105.21 of drainage warrants, issued prior to said sale, as a discharge of her obligation to account for drainage funds collected on private property and as a discharge from her own liability to that fund as assessee of the streets and squares?

Second. Should the decision in the case of Peake vs. New Orleans, 139 U. S. 342, be held to apply to the facts of this case and operate to defeat the Complainant's action?"

The first question was answered in the affirmative, and the second the Court declined to answer as not involving a distinct question, but the whole case. See 167 U. S., page 467 and following.

Thereafter said Circuit Court of Appeals declared as follows:

"The City of New Orleans, under warranties expressed and implied ontained in the contract of sale of June 7, 1876, by which she acquired the property and franchise from Warner Van Norden, and under the averments in the bill, is estopped from pleading against Complainant below and Appellant here, the issuance of Bonds to retire $1,672,-105.21 of drainage warrants, issued prior to said sale, as a discharge of her obligation to account for drainage funds collected on private property and as a discharge from her liability to said fund as assessee of the streets and squares. Warner vs. City of New Orleans (167 U. S., p. 467).

On the case made by the Bill of Complaint, the decision of the Supreme Court in the case of James W. Peake vs. City of New Orlans, 139 U. S. 342, does not necessarily apply to the facts of this case, nor operate to defeat the Complainant's action. It follows that the Circuit Court erred in sustaining the demurrer to Complainant's bill.

The decree of the Circuit Court is reversed, and the cause remanded with instructions to overrule the demurrer to Complainant's bill, and thereafter proceed as equity and good conscience may require." (R. p. 180.

Thereafter the mandate of said Circuit Court of Appeals was filed in the Circuit Court, (p. 182) and the Complainant amended his bill praying that in said account interest be computed on said drainage tax judgments from the date thereof, at 6 per cent per annum, in accordance with the 7th section of Act 165 of 1858, (Stat. p. 4), and that Complainant be decreed interest at 8 per cent per annum upon the warrants sued on (R. p. 184), and thereafter Defendant answered the original and amended bills among other things setting up many of the matters already decided by this Honorable Court. Said answer, (pages 186 to 202) though very long, in substance, is as follows:

Though admitting the amount of assessments as stated in the bill, and that the assessment rolls were homologated by judgment of Court, said answer contends there was only a conditional liability imposed thereby, entirely dependent upon benefits to be conferred, and that this conditional liability was only confined to assessments on private property, but that the commissioners first, and the Board of Administrators afterwards, illegally extended said assessments to the streets and square and other public property in all of the drainage districts and homologated the rolls for said assessments, and contends that said assessments and judgments of homologation are absolutely null and void because levied on public property exempt from assessment; and that the portion thereof levied and homologated prior to said Act 30 of 1871, and by said Act confirmed and made exigable, are of no validity whatever, because based on the aforesaid public property and things not susceptible of assessment, and that said assessments, on both public

and private property in the Fourth Drainage District are wholly null and void, as was decided in 22 An., p. 33, because the law and the ordinance of the Council under which said District was created and said assessment levied, and the rolls therefor homologated, were unconstitutional. The answer also alleges the city has in all things done its full duty as to the collection of the drainage taxes from the time she took charge in 1874, under Act 30 of that year, until June 9th, 1891, when a Receiver was appointed, and that in all its efforts to collect said taxes it has disregarded all Acts of the Legislature and proceedings of the Council of the City of New Orleans in any manner calculated to interfere with and prevent said collections, and that it has faithfully applied every dollar of said collections according to law and accounted for the same, and that no more of said taxes can now be collected, since the consideration of said taxes has entirely failed, and this, because of what is called the plans of the Canal Company and Van Norden were insufficient and bad, and because the work done under said plans was defective, and improperly done, and that because of these things it has become the settled jurisprudence of Louisiana that no more drainage taxes can now be collected.

It is further contended said city has fully paid and discharged all of its liability, whether based on said assessments on the streets or on private property, by the issue and delivery of $1,672,105.21 of bonds of the "drainage series," to take up and retire drainage warrants; this it is protected from any claims of holden of purchase warrant by the amendment to the constitution of the State, preventing

the further issue of bonds, and going into effect on January 1, 1875; that the matter here are *res adjudicata* against Complainant, because of the decision in said Peake case; that the claim of Complainant on drainage warrants is prescribed by five years from their date, and that the judgments of homologation of the assessment rolls are prescribed, respectively, by ten years from the date of each judgment of homologation.

Thereafter replication was filed, and after the proofs were all in, the case was duly heard by the Circuit Court, and judgment was rendered dismissing Complainant's bill with costs, (R. p. 544), and thereupon an appeal was taken to said Circuit Court of Appeals with an assignment of errors to be found at pages 545 to 548 of the record.

Said Circuit Court of Appeals reversed the decree of said Circuit Court and decreed complainant was entitled to recover, and referred the case to a master to state the account out of which Complainant was to be paid, &c. (R. 550.)

Defendant then applied for an appeal to this Honorable Court, which was allowed by one of the justices thereof, (p. 584) and this appeal was dismissed on October 24th, 1898, in suit No. 336, October Term 1898, and now this application for a writ of *certiorari* is presented.

ARGUMENT.

I.

The amount in dispute as an argument for the issuance of the writ of *certiorari* we dismiss as it does not require

notice, the reason or reasons for the granting of the same not being dependant upon the amount involved.

II.

As to the alleged misapprehension and wrongful application of the decision rendered in this Honorable Court in Warner vs. New Orleans, 167 U. S., page 467.

The Court there not only answered the question submitted to it, in the affirmative, to-wit:

"That the City of New Orleans was estopped from pleading against Complainant—the issuance of bonds to retire $1,672,105.21 of drainage warrants, issued prior to said sale, as a discharge of her obligation to account for drainage funds collected on private property and as a discharge from her own liability to that fund as assessee of the streets and squares.

But it also announced the legal principle by which this case was governed in these words:

"Whatever equity may do in setting off against all warrants drawn before this purchase from the canal company and its transferee, the bonds issued by the city (and in respect to that matter we can only refer to Peake vs. New Orleans, supra, it by no means follows that the city can draw warrants on the fund in payment for property which it voluntarily purchases, and then abandon the work by which alone the fund could be made good, resort to means within its power to prevent any payments of assessments into the fund, and thus, after violating its contract, promise not to obstruct or impede, but on the contrary, to facilitate by all lawful means, the collection of the assess-

ments, plead its prior issue of bonds as a reason for evading any liability upon the warrants. One who purchases property and pays for it in warrants drawn upon a particular fund, the creation of which depends largely on its own action, is under an implied obligation to do whatever is reasonable and fair to make that fun good. He cannot certainly so act as to prevent the fund being made good, and then say to his vendor, you must look to the fund and not to me."

How has the duty here pointed out—"the implied obligation to do whatever is reasonable and fair to make that fund good"—been performed by the city, or has it acted so as "to prevent the fund from being made good?—the fund, which, at the date of said sale on June 6, 1876, consisted of assessments against the City of New Orleans and individuals of $1,469,714.47, exclusive of interest, of which $696,394.30 was due by said city, and $773,320.17 by individuals. (These amounts are admitted to be correct. R. p. 189.)

And here we do not are to enter into any detailed discussion as to the conduct of said city as to the discharge of its duties under the drainage acts, under the Act 16 of 1876, and under the covenants in the bill of sale of June 7th, 1876, farther than to say that she has violated every duty imposed on her in reference to making said taxes collectable and collecting the same, every duty arising under the covenants in said bill of sale contained, and that every averment in the bill of complaint is true. We will, however, advert to some of the matter dislosed by the record.

When the city bought Van Norden's dredge boats and

apparatus(all of which were in the very best condition, with machinery in duplicate parts, so that if anything broke, it could at once be replaced with a new piece.) (Moody, R. p. 274). Report of Hardee (R. pp. 91 to 97) and became qualified to do the drainage work, and under the provisions of the Act of 1876 (Stat. p. —), possessed of the exclusive privilege of doing said work, she quietly abandoned said work. Moody, on page 110, (R. p. 274) after detailing the work done up to that time, and saying the work was about two-thirds completed, says there was no other work thereafter done by the city, and in fact there is no contention on the part of said city to the contrary. She not only abandoned said work, but proceeded to disqualify herself to do any work of drainage. This was judicially found in Davidson vs. New Orleans, 34 An. p. 170. See, also, reports Commissioner of Public Works (R. p. 225 to 230).

On April 8th, 1878, by ordinance 4483, (R. p. 216) she instructed her Administrator of Improvements to advertise said dredge boats purchased from Van Norden and the Canal Company for sale. For some reason they were not sold, and on the 1st of July, 1878, by ordinance 6038 (R. p. 218) after reciting that three of said boats were then in bad condition and necessitated expense in watching, directed said Administrator to have said boats broken up, and the material stored. On March 17, 1880, after declaring parts of the wrecks of said boats, those borken up under the above ordinance, were valueless, except as old iron, and declaring the city needed lumber, spikes and nails for construction and repairing bridges, said city, by Ordinance

No. 6396 (R. p. 219) ratified an exchange of materials effected by said Administrator with Shwartz & Co., for said needed articles. On December 26th, 1880, the city surveyor, under Ordinance No. 6741, made the following report of the condition of said dredgeboats. (R. pp. 217 & 218.)

Hon. John Fitzpatrick, Administrator of Improvements,
City of New Orleans:

Sir:

In compliance with ordinance No. 6741, A. S., I have the honor to submit the following report as to the condition of the dredge boats belonging to this city:

Dredge Boat No. 1.

Now moored in Mississippi River, Algiers side, near Brady & McClellan's Dry Dock Co.; machinery on board; dipper and dipper handle lying on the bank.

Dredge Boat No. 4.

Sunk about twenty yards from dredge boat No. 1.

Dredge Boat No. 3.

Sunk in People's Avenue Canal; water foot and a half above boiler deck; impossible to ascertain what machinery the boat contains; hoisting and working chains not in sight; dipper lying about three hundred feet above the boat on bank of the canal.

Dredge Boat No. 2.

Dismantled; hull sunk in People's Avenue Canal.

Dredge Boat Clam Shell.

Dismantled and sunk in People's Canal.

Ridge Boat.

Dismantled and sunk in London Avenue Canal.

Dredge Noyes.

Now lying in Upperline Canal with machinery aboard; boat in leaking condition; inventory of tools, etc., found on board now on file in this office; also receipt for dipper loaned General Slaughter.

Your attention is respectfully called to Ordinance No. 6038, A. S., passed July 1, 1879, authorizing the dismantling of the Clam Shell, Ridge and No. 2, and ordering the machinery and old iron to be stored in Erato street yard. Ordinance No. 6039, A. S., passed March 17, 1880, shows what disposition was made of her machinery, old iron, etc., of the dismantled boats."

And thereafter, on the 5th day of April, 1881, by Ordinance 6970, the mayor of the city was authorized to issue, and on the following day did issue his proclamation (R. p. 271) advising drainage tax payers not to pay their taxes until the right to exact the same had been settled by the Supreme Court of the State (as if the validity of said taxes had not already been determined by the Courts in the First District, by the Supreme Court of said State (27 An., p. 20), and affirmed by the Supreme Court of the United States, 96 U. S. p. 97.)

But what decision did the mayor and council expect?

On the question whether the scheme which the city had entered upon after its purchase, of abandoning the drainage system and disqualifying herself to complete the same, as above stated, would be decreed a legal excuse to the tax payer for not paying his tax, and this it was declared to be by said Court in Davidson vs. New Orleans, 34 An., p. 170. In other words, whether her own failure of duty would be held as a legal obliteration of the taxes assessed against private individuals, and in this, as before stated, she was successful, for in the above case the Court, at page 175, after stating no benefits had yet been conferred to the property there sought to be relieved from the tax, etc., and speaking o f"the abandonment of all drainage work, the disposition of all drainage apparatus, the impotency of the city to resume the work," etc., dceided the tax could not be collected, and this has become the settled jurisprudence of the State.

After this decision a committee of the council, on the 15th day of May, 1883, (R. pp. 349 to 352) showed how the drainage tax payer, by availing himself of the benefits of the above decision could get rid of paying said taxes, and declared, "if the city, by any act of her own, would prevent the collection of the tax or annul it to the injury of warrant holders, * * * some liability might arise against the city," and concluded by saying, "they are of opinion the whole subject should be let to exhaust itself and work out its own solution," which it has been doing ever since.

And during all this time the city kept an office open, where the drainage tax payer might pay his taxes in case he saw fit to do so, but took no active means to collect said

taxes, or make them collectible, and as a result, the above report shows the collections (R. pp. 319 to 349) were not sufficient to pay the expenses of the officials of the office, and now declares that after being in charge of said collections and payments as a voluntary and contractural trustee from the time of said sale, in 1876, to June, 1891, she could not collect any more, because the same were uncollectible, because the drainage plan (which it declares was Van Norden's) was bad and the work done thereunder was poorly and defectively done, but this, as a matter of fact, is not true, as the plan (except as to a general provision for an outside protection levee, was that of the city herself, as an examination of the statutes and the ordinances of the city herself will show.

By the second section of the Act No. 30 of 1871, the Canal Company was authorized to dig a canal, and with the earth removed therefrom, to build outside said canal a protection levee in the rear of the city near Lake Ponchartrain, the location of said canal and levee, and all canals dug and levees built by said company to be designated and fixed by the Board of Administrators of the City of New Orleans, the said lake shore canal to be not less than sixty-five feet wide on the surface and fifteen feet deep in the middle, with proper sides; the said canals along the lake shore to serve as a reservoir for drainage of the city and lands in the rear, from which the drainage was to be pumped into the lake, said protetion levee to be not less than one hundred feet wide at its base and of sufficient heights to protect the city from overflow from said lake.

By the 3d section of said act, said company was authorized to excavate the canals of the dimensions and at such localities as might be fixed by said Board of Administrators, which should fully drain the area, bounded by protection levees therein contemplated, and the Mississippi River, and connect with the drainage canals there located in said area.

By the 4th section of said act said company was authorized to buid a canal and protection levee below the city to connect with the lower end of the protection levee along the lake and the Mississippi river, of a sufficient size to protect the city from overflow, on a line to be designated by said Board of Administrators, and to construct a like canal and protection levee above the city, the dimensions and locality in like manner to be designated by said administrators, the object of these canals and protection levees being the protection from overflow, etc.

By the 5th section of said act said canal company was authorized to dig all smaller canals required for drainage of New Orleans and lands in the rear of the dimensions of 10 feet or more in width, and by the 6th section of said act said administrators were directed to locate the lines of the canals and protection levees specified in the various sections of said act, and by said section it was further provided, that, should the City Council fail to locate the lines of said canals and protection levees as in said act specified, said city should be responsible in damages, and by the 7th section of said act it was made the duty of the city surveyor or other engineer to be appointed for the purpose to examine monthly the work done by said company during

each month and measure the width and depth of the canals dug and levees built, and certify the cubic yards thereof, on which drainage warrants were to be issued, etc.

So much for what the act of the legislature required to be done by the city.

And next as to what the city did do in pursuance of the provisions of said act in reference to said plan.

On the 27th of April she adopted ordinance No. 814, declaring that, whereas the Legislature by Act 30 of 1871 had made it mandatory on the Council of the City to provide, on the part of said city, for an extensive system of drainage, to lay out the lines and fix the location and dimensions of certain canals and levees, and in various ways to recognize the claims and accounts of and make settlement with the canal company in excavating said canals and building said levees, etc, ordained as follows: (Record, pp. 244 to 246.)

Sec. 1. That all matters appertaining to drainage and the protection of the city from innundation be placed in the immediate charge of the Administrator of Improvements, aided by the city surveyor.

Sec. 2. That the Mayor and Administrator of Finance be associated with the Administrator of Improvements as a standing committee on drainage; that said committee prepare a plan of the work to be entered upon immediately, and report to the Council at its next meeting what canals and levees or extensions of present canals and levees are most urgently required, and that upon the approval of the same by the Council, the Administrator of Improvements shall authorize the canal company to enter upon the

performance of said work under his (said Administrator's) direction, and said company was notified * * * that such work, and no other, as should be performed with the consent and approval of the Council would be settled for as in said ordinance, provided, viz.:

1. The city surveyor was to measure and certify all canals and levees then existing upon the line of the works entered upon so far as the same might form part of the canals and levees to be constructed, the same to be allowed for by said company in deduction of their measurements of work performed and completed.

2. The canal work was to be measured and certified monthly, and the levee work to be certified monthly, and certified so far as the same should have been shaped and completed and sufficiently dried for the passage of vehicles thereon, it being the intention of said ordinance that said levee should have the full dimensions required after the same was dried and ready for use.

3. That the earth removed from the canals and not required for levees should be the property of the city to be disposed of as she thought proper. That nothing in said ordinance was to be so construed as to imply that the earth taken from the canal and placed upon its banks should constitute a levee, but only such deposits as the committee should decide to be necessary for levee purposes should be paid for.

On May 4, 1871, the City Council adopted Ordinance 820, which authorized said company to commence the following named work subject to Ordinance No. 814, to-wit: (R. p. 246.)

"1. Clearing Hagan Avenue Canal to a depth of twelve feet; excavating a tail-race to connect with Orleans Street tail-race, and widening and deepening Orleans tail-race through the City Park.

"2. Excavating Fourteenth Street Canal through Metairie Ridge with protection levee on upper side.

"3. Widening and deepening Marigny Canal from Bayou St. John to Elysian Fields Street."

On June 29, 1871, said Council adopted Ordinance No. 944, (R. pp. 246 & 247) wherein it

"Resolved, That the drainage committee prepare a plan for the construction of a protection levee on or near the lake shore, which, after being approved by the Council, shall be the guide for the contractor and surveyor, under the direction of the Administrator of Improvements, in the execution of the work."

On the 18th of July, 1871, the Administrator of Improvements submitted to said Council a plan for the commencement of the work on the lake shore protection levee, which was adopted, (R. p. 258) and is in these words:

"The following plan is respectfully submitted for the approval of the Council as the most practical and permanent one for the commencement of a lake shore protection levee, viz.:

"Commencing at Upperline protection levee, extending in the lake to a depth of not over one foot of water at low tide, running in a westerly direction to the New Canal, also commencing at Pontchartrain Railroad to proposed Lowerline protection levee, being a distance of about two thousand feet."

On December 13, 1871, the said Council by Ordinance 1252. (R. p. 259.)

"Resolved, That the city attorney take such legal steps as may be necessary to cause the immediate expronpriation of such land and property as may be necessary for the proposed drainage canal from Galvez Street to Carrollton Avenue, running parallel to the New Canal, at a width of one hundred feet from the New Canal or State property."

On the 16th of February, 1872, by Ordinance 1362 the said Council amended the above Ordinance 820 to read as follows: (R. p. 259.)

"First paragraph to read:

"Excavating a tail-race from Hagan Avenue to Orleans Street; widening, deepening and extending Orleans tail-race from Bayou St. John to Lake Pontchartrain; excavating the canal parallel to the New Canal—authorized by Ordinance No. 1250 (1252) administration series—and cleaning out and deepening the Hagan, Carrollton, Broad and Galvez Street Canals.

"Second paragraph to read:

"Excavating the Upperline Canal near the old Carrollton Railroad and parallel with the same, with protetion levee on the upper side.

"Third paragraph to read:

"Widening and deepening Marigny Canal from Bayou St. John to Elysian Fields Street; widening and deepening the London Avenue Canal from Broad Street to the draining machine; widening and deepennig Broad Street Canal from Marigny Canal to the line of trees of said

Canal, and widening St. Bernard Avenue Canal from Broad Street to Claiborne Street.

"Provided the Council reserves the right to stop any portion of the foregoing work at any point of its progress."

On the 21st of February, 187?, by Ordinance No. 1374, it was ordained by said Council (R. pp. 260 & 319):

"That the contemplated canal on the north side of the New Canal, as adopted in the proceedings of October, 1871, be so located that the said canal be dug out of the middle of Poydras Street, commencing at Galves Street, to Carrollton Avenue, the earth to be thrown on the river side of Poydras Street."

And on the 4th of August, 1875, (R. p. 319) said Council by Ordinance No. 3209, ordained:

"Resolved, That a drainage canal be located on Nashville Avenue to connect the Claiborne Canal with the low ground or basin between St. Charles Avenue and the Mississippi River, said work to be performed by the Mississippi and Mexican Gulf Ship Canal Company, and the city surveyor is hereby authorized and directed to locate said canal so as to cause the least possible obstructions to the street."

The above embrace all the canals dug and levees built by said company and Van Norden, and every one of them was located by the city herself. The plan, therefore, was that solely of the city herself.

And how was the drainage work done by the canal company and Van Norden? Was it well done or defectively done?

As we have already shown, the whole matter was under the direction of the Administrator of Improvements and

his committee, as well as under the supervision of the city surveyor, and under Ordinance 814 it was only such work as was actually done that was to be measured and paid for. In fact, by said ordinance the company was notified that only such as should be performed with the consent and approval of the City Council was to be settled for, and all the presumptions are that it was so done, when the measurements were made by said surveyor and when he certified the same to the Administrator of Improvements, and when the latter drew his warrant therefor. But we are not left to presumptions alone. On the 17th of November, 1874, said Administrator of Improvements reported to the Council in detail what work had been done by said company and Van Norden, from the commencement until that day, and this report on the following day was adopted and approved by the Council of the defendant (R. pp. 301 to 305).

Nor is this all. From December, 1874, to the time of the sale to the city in June, 1876, H. C Brown (a witness for defendant) was the city surveyor in charge of the drainage work, done by said parties, and while on the stand was asked and said as follows: (R. p. 458.)

Q. How was all that work that was done by the canal company and Van Norden; was it well done?

A. It was well done; there is no question about that; never has been, I think.

We, therefore, repeat this charge, like the preceding one is entirely without any foundation.

The result of the foregoing, as to said plan and the work done thereunder is this: the plan was that of the defendant, and the work done thereunder by the canal company

and Van Norden from the time she took charge in June, 1871, to the time she purchased from said company and Van Norden, in June, 1876, was well done, and in accordance with her plan, and hence her contention that she is not indebted because the plan was bad is simply ridiculous. As well might the proprietor, who has selected and adopted his plans, and employed his contractor to do the work in accordance to said plans, say to said contractor when the work is all done and strictly in accordance with said plans, "The plans—my plans—are bad, and I will not pay you for your work."

And the weight of the evidence is that the city's aforesaid plans, if completed, would have accomplished the purpose for which it was designed. See the evidence of the following witnesses on the following pages of the Record: W. H. Bell, City Surveyor, under whose supervision said plan was two-thirds completed, p. 47; Frameaux, Bell's assistant, p. 123; Collins, Administrator of Improvements, p. 51; A. C. Bell, the present City Surveyor, p. 150; Palmer, pp. 134 and 135.

The complaint of the city now is that her former plan was deficient in interior reservoir canals. (Brown, R. p. 451; Harrod, R. p. 467). And according to Brown, to have completed the uncompleted work on the lake shore would have cost in cash $437,500, (R. p. 457) and to make the interior canals above referred to would have cost $100,000, (R. pp. 457 and 458), or a total of $537,500, and this would have made the drainage effective, yet the city abandoned it all and rendered it incomplete and ineffective.

Surely the contntion that the city could thus abondon

her own plan of drainage, never adopt another, abandon all drainage work, render the assessments against private property uncollectible, and then say there is nothing in the fund against which said warrants are drawn and I can pay you nothing, is directly in conflict with the declaration of the Supreme Court in the above case.

It may well be that the private owner could successfully urge—just as was done in the Davidson case—that his land has not yet been benefitted; that the plans to drain and benefit the same have been abandoned, and the city has deprived herself of the means with which to carry on said work of drainage by the loss and sale of the implements wherewith to accomplish said work, but surely the city herself cannot successfully plead her own derelictions in this respect, keep the property purchased with an obligation whose value depends upon her completing said work, and pay nothing.

And the above decision of Warner vs. New Orleans, 167 U. S., p. 467, is in accord with the decisions of the State of Louisiana, and of this Honorable Court on this subject.

The form of the warrants drawn against this fund is found at R. p. 109, and in substance and effect is a check drawn by the treasurer of the City of New Orleans in favor of Van Norden. It is, in all its essentials, like a check on a bank, drawn against a particular fund, and, unlike the check at common law, is an assignment of the fund to the extent of the amount on the check.

In Gordon & Gomilla vs. Mucher, 34 La. An., p. 605, this point was expressly decided, and the distinction between the civil and common law noticed. In that case there was

a triangular contest between three creditors of the defendant over a balance outstanding to the credit of his deposit account with the Union National Bank, viz.:

1. The Union National Bank claimed the credit was extinguished because it (the bank) was holder of a dishonored draft of defendant, and had applied the credit to the extinguishment of said debt.

2. The Louisiana National Bank claimed it as holder of a check of defendant on said Union National Bank for the exact amount of the credit, which check had been duly presented to said Union National Bank and payment thereof demanded, and, on refusal, had been protested, and written notice given to said Union National Bank that it was claimed to operate as an assignment of the credit.

3. Gorder & Gomilla claimed the fund by virtue of an attachment thereof after the above proceedings.

After disposing of the calim of the Union National Bank adversely to its pretensions, said, of the claim of the Louisiana National Bank as follows:

"It will not be disputed that a written order by a creditor addressed to his debtor, directing him to pay to a third person a debt due the former, accompanied by due notice to the debtor, would comply with all the requirements imposed by Civil Code. Arts. 2642 to 2654, for the valid giving of title, delivery and complete assignment of the credit or incorpereal right referred to in the order.

"On general principles the check, its presentation, protest and the written notice herein given unquestionably fulfill these requirements.

"The question presents itself: on what principle shall we

refuse to give such a transaction the effect which is given to it under the textual provisions of our Code?

"In the slightly considered case of Case vs. Henderson, 25 An., 48, it was held that the check holder did not acquire a right af action against the bank, upon the authority of the Supreme Court of the United States in Bank vs. Millard, 10 Wallace, 152. That was a case at law, in error to the Supreme Court of the District of Columbia, where the common low prevails: first, that no such privity was created by mere presentation of the check, without acceptance by the bank, because the depositors' right was a mere chose in action not assignable without the consent of the debtor.

Choses in action correspond to or, at least, are included within the civil law definition of incorporeal rights, our law differing therein from the common law distinctly cognizes the assignability of that class of incorporeal rights known at common law as choses in action, and provides for the perfectability of such assignments by notice to the debtor and independent entirely of his consent, and, from the moment of such notice, createst a privity between the debtor and the assignee, appurtaining to a perfect legal tie. It follows that the reasons underlying the common law decisions quoted have no application or existence under our law, and the decisions, therefore, have no application as authority here.

"In a very recent case decided by Justice Miller on circuit it was held that a check, duly notified to the bank, constituted an assignment of the fund drawn against which a Court of Equity will enforce in favor of the check holder, although a Court of law will not. Bank vs. Coates,

12 Reporter, 514. Even had the check in the instant case been drawn in a common-law State upon a bank in such State, so that the rights of the check holder would have been regulated by *lex loci contractus*, yet if the action thereon had, by any means, been brought in our forum, our Courts would have looked to, and have enforced the equitable rights of the check holder, and would have maintained the assignment. Jackson vs. Tiernan, 15 La., 485. Here the check and notice operate, not merely as equitable, but equally, a perfect legal assignment."

All that was necessary to complete the assignment of the drainage tax to the amount represented by the respective warrants given in discharge of the purchase price was notice to the debtor, and this notice was given, in case of each warrant, assignment or transfer, when such warrant, transfer or assignment was presented for payment, and, not being paid, the fact and date of presentation was endorsed thereon by the Administrator of Finance. See form of warrant (R. p. 109).

Even under the common law, these drainage warrants, being orders or checks drawn against a particular fund, specially appropriated to their payment, the Court of Great Britain would hold they were an assignment of that fund. Citizens'Bank of La. vs. First. Nat. Bank, Law Reports, 6; House of Lords, 352; English Reports, 7; Moak, 36.

These drainage warrants, being an assignment of the drainage tax, the question is, where is the warranty? Under the title of the Civil Code relating to the "Assignment or

Transfer of Civil Credits and Other Incorporeal Rights," Art. 2646 says:

"He who sells a redit or an incorporeal right warrants its existence at the time of the transfer, although no warrant be mentioned in the deed."

The warranty exists though no warranty be expressed in the instrument of transfer. Foley vs. Swayne, 2 An., 880. Even in case of stipulation of no warranty, as "an assignment without any recourse or claim whatsoever against the vendor," the seller in case of eviction, is liable for the restitution of the price, unless the buyer was aware, at the time of the transfer, of the danger of eviction—that is, was aware that any realization on the transfer was a mere matter of hazard and chance—and purchased at his peril and risk. Civil Code 2505 provides as follows:

"Even in case of stipulation of no warranty, the seller, in a case of eviction, is liable to a restitution of the price, unless the buyer was aware, at the time of the sale, of the danger of eviction and purchased at his peril and risk."

See also Corcoran vs. Riddle, 7 An., 268; Jenkins vs. the Parish of Caddo, 7 An., 559; Johnson & Co. vs. Boise & Frelson, 40 An., 273. In the latter case it was decided that when tranferrer of a judgment sells all his rights to it, and to a suit growing out of it, he warrants the existence of the debt at the time of the transfer, and that if the debt had been extinguished and was not in existence at the time of the sale—the very defense which the bill charges the defendant will set up here—the vendor is bound for the price. That is, if the restitution or satisfaction can be paid in money, and if not, the parties are remitted to the gen-

and law regulating the Courts of Justice in the affirmance of contracts. Article 1927 of the Civil Code states it as follows:

"In ordinary cases, the breach of such a contract entitles the party aggrieved only to damages, but where this would be an inadequate compensation, and the party has the power of performing the contract, he may be constrained to a specific performance by means prescribed in the laws which regulate the practice of the Courts."

As was shown in Lavine vs. Mitchell, 35 An., p. 1121, this is in accord with the equity jurisprudence on this subject. See cases there cited, and especially sections 717 and 718 Stoy's Eq. In fact the warranty in like cases has been enforced by the Supreme Court of Louisiana against this defendant. In the case of Tournier vs. Municipality Number One, 5 An., 298, the court stated the facts of the case and decided in favor of said warranty as follows:

"The plaintiff claims from the defendant the sum of $3682.40 for work done and materials furnished under two certain contracts made by the municipality with Hubert Girard, for the making and laying of flatboat gunwale banquettes in the suburb Treme. By these contracts the municipality was to pay one-third of the price agreed upon, and two-thirds were to be paid by the owners of property in front of which the banquettes were to be made. The municipality paid its third, but it is alleged that the plaintiff has not been able to collect the whole of the remaining two-thirds from the property holders, from causes for which the muncipality is responsible. This suit is for the amount which the defendant has been unable to recover. The plain-

tiff had judgment in the court below and the defendant has appealed.

"It having bee determined by a court of competent jurisdiction in the last resort that the plaintiff could recover one-third of the cost of the work from the owners of property, instead of two-thirds, as was stipulated in the contract between the parties, it seems to us necessarily to follow that the plaintiff has a claim on the municipality for the deficiency. The contrator agreed to take, as the price of his work and material, the debt of the adjacent property owners for two-thirds, looking directly to the municipality for the one-third. The municipality warranted to the contractor the existence of the debt, or recompense against the property owners for two-thirds of the cost. This debt having been determined not to be due, the warranty is falsified, and the municipality is bound by it."

And the same principle was decided in Cronin vs. Municipality No. One, 5 An., page 537, where the head note is as follows:

"Where the Municipality Number One contracts with a paver, that he shall be paid a portion of the price by the proprietors of the property fronting on the pavement, and these proprietors refuse or neglect to make the payment, the Municipality is bound for the amount stipulated to be paid by the contract."

Another case, directly in point, on the question of implied warranty, is the late case of Meyer vs. Richards, 163 U. S., p. 385. In that case, as in this, the parties thought they were dealing with matter having a real existence; in that case, that the bonds had an existence, and in this case

that the drainage taxes—especially those due by the City of New Orleans—all levied, and the rolls homologated by the Courts, had an existence, had not been extinguished, and were available for the payment for the purchase warranta. In fact, the very existence of the taxes at the time of the sale, and their availability for the payment of the purchase warrants was the very consideration for the sale. The Court, after stating the law of Louisiana on the question of implied warranty and quoting the Civil Code and citing the case of Knight vs. Lanfear, 7 Rob., 172, and Pugh vs. Moore, Hymes & Co., 44 An., 209 (wherein was sought the recovery of the price paid for the purchase of unconstitutional bonds), said:

"The Supreme Court of Louisiana, after elaborate consideration, held, among other reasons, that the seller having been obligated to the warranty of the existence of the bonds at the time of the sale, and the bonds being void under the Constitution, he was obliged to return the price."

And after stating the above law was drawn from the Code Napoleon, and from the Roman law, and that under the authorities of that Court, when the provisions of the Louisiana Code and the Code Napoleon are identical, the expositions of the civil law writers, and the adjudications of the French Courts as to the proper construction of the Louisiana Code, were persuasive, quoting from the French Commentators as following, beginning at page 400:

"Marcady, in his commentary on the law of sale, thus states the rule:

"'All sales of a credit subject the seller, unless there be a stipulation to the contrary, to a guarantee of the existence

and validity of the credit, as also his right of ownership to it. Article 1693 speakes, it is true, only of the guarantee of the existence of the credit, but as the credit existing today, if subsequently declared to have been void, would in contemplation of the law have never existed, and also as it would be equally immaterial for the buyer if the credit had a real existence, if that existence was available only to some one else, it is evident that by an existing credit is to be understood one which validly exists, as the property of him who transfers it. One who transfers, then, is held to guarantee in three cases: (1) If at the time of the sale the credit did not exist, either because it had never existed or because it was extinguished by compensation, by prescription or otherwise. (2) If the credit should be declared to have been void, or the obligation be rescinded. (3) If it belonged to another person than the transferrer. Marcade, De la Vente, 335.'

"Troplong, in his learned treatise on the same subject, thus expounds the doctrine:

" 'In the sale of a credit, as in that of every other object, legal warranty is always understood. The vendor guarantees to the vendee the existence of the credit at the moment of the transfer although there be no expression in the contract to that effect. It is this which caused Ulpian to say: "When a credit is sold, Celsus writes in the ninth book of the Digest, that the seller is not obliged to guarantee that the debtor is solvent but only that he really is a debtor, unless there has been an express agreement between the parties on the subject." This guarantee is more strictly obligatory in the sale of a credit than in other matters,

because the right to a credit is either visible or palpable, as it is in the case of other movable or immovable property. * * * And here let there be no misunderstanding. Do not confound the credit with the title by which it is established. Both law and reason exact that the credit should exist at the time of the sale, and it is not sufficient that a title should have been delivered to the buyer. The title is not the credit. It can materially subsist, while the credit is extinguished. Thus, if the credit had been annihilated by compensation or by prescription it would serve no purpose to deliver to the buyer a title which would have nothing but the appearance of life. The buyer in such case would have a right to avail himself of the warranty. (Troplong, De la Vente, 931, 932.)'

"And Laurent, the latest and fullest commentator, says:

" 'Art. 1693,' that 'the seller guarantees the existence of the credit.' We understand this word 'existence' in the sense given to it by tradition. 'Whoever,' says Loyseau, 'sells a debt or rent, guarantees that it is due and lawfully constituted, because, without distinction in all contracts of sale, the seller is bound to three things by the very nature of the contract: (1) that the thing exists; (2) that it belongs to him, and (3) that it had not been engaged to another.' Pothier resumes this distinction by saying 'that the guarantee of a right consists in the undertaking that the right sold is really due to the vendor'; and the Code is yet more brief, since it speaks only of the existence of the debt. We must, therefore, see what the existence of the debt signifies according to the explanation of Loyseau. Firstly, the vendor is held to guarantee that the debt exists

and subsists (*soit et subsisto*). If the debt had never existed beause one of the condition necessary for the existence of the contract makes default, the vendor has sold nothing; there is no subject; he is held to the guarantee; this is obvious. The same rule would apply, if the debt had existed, but was extinguished at the time of the transfer, because it is as if it had never existed. Such would be the case of a credit which was prescribed, or which had been extinguished by compensation. * * * It is necessary, in the second place, that the credit should be as constituted, says Louseau. If it is stricken with a vice which renders it void, the vendee has a right to the warranty. This is not doubtful, since the right is really annulled or rescinded, because, the judgment annulled, the credit destroys it as if it never existed.' (Laurent, Vol. 24, Nos. 540, 541, 542."

And the Court then said:

"The views thus expressed by the foregoing writers are substantially concurred in by the French commentators. Duranton, Vol. 9, p. 183; Aubrey & Rau, Vol. 5, p. 442. The Courts of France from an early day have applied the same principle."

The Court then gives two French decisions, as follows:

"In Prat vs. Dervieux the facts were these: Dervieux transferred the amount of a claim against the gomernment, which by a subsequent liquidation of accounts was compensated by a claim held by the government which resulted from another matter. The Court of Cessation held that, under Art. 1693 of C. N., the obligation to guarantee the existence of the claim at the time of the sale compelled the seller to restore the price. Journal due Palais, p. 311.

"In Revel vs. Lippman a transfer was made of a claim against the government, which was stated to be subject to a future settlement of accounts. On the ultimate liquidation it was found that nothing was due, and the Court of Cassation held that the obligation, therefore, arose to return the price paid on the sale. Journal du Palais 1625, p. 963."

In the case of Semel vs. Gould, 12 An., 225, it appears that the police jury of the Parish of Point Coupee contracted with the plaintiff for the building of a levee upon certain specific lands, it being specially stipulated that the contractor should look for payment exclusively to the lien given by law on the land for the cost of the work. But when the contractor attempted to enforce the lien for the amount due him, it appeared that the land belonged to the United States and was not liable. The contractor, therefore, sued the police jury and recovered judgment, in affirming which the Supreme Court said that:

"In making the contract for building the levee there was an implied warranty on the part of the police jury that the land on which the work was to be done belonged to a person whose property could be reached by their ordinances to defray the expenses of such work."

This case was cited in Cole vs. Shreveport, 41 A., 841, where it appears the plaintiff contracted to do certain paving, the cost of which, by an act of the legislature under which the work was supposed to be authorized, was to be done, two-thirds by the owners of the property, and one-third by the city. By a stipulation in the contract the plaintiff was to receive in payment of the city's share certain wharfage dues. After the work was done the Courts

decided that the property holders were not liable, and that the collection of wharfage dues was unlawful. These sources of payment having failed, suit was brought against the city for the price of the work. Upon appeal from a judgment in favor of the plaintiff it was contended that, having contracted to accept the wharf dues in satisfaction of his work, the plaintiff must be satisfied with the "pound of flesh" and had no recourse against the city upon the failure of the tax, but the Court refused to adopt this view of the rights of the contractor, remarking in the course of its opinion (p. 845):

"Jurisprudence has settled that, notwithstanding a stipulation specially excluding any recourse on the city, a contractor who had done useful works, and whose payment failed by reason of subsequent events which had diverted the revenues applied to his claim, could recover against the city with which he had contracted.

"That was the treatment applied by the Supreme Court of the United States in the case of Hitchcock vs. Galveston, 96 U. S., 341.

"The principle which underlies our conclusions in this controversy is so well and clearly expounded by the exalted tribunal that we are induced to make the following extracts from their decision:

" 'They, plaintiffs, are not suing upon the bonds, and it is not necessary to their success that they should assert the validity of those instruments. It is enough for them that the city had power to enter into a contract for the improvement of the sidewalks; that such a contract was made with them; that under it they had proceeded to furnish materials

and do work, as well as to assume liabilities; that the city has received and now enjoys the benefit of what they have done and furnished; that for those things the city promised to pay, and that, after having received the benefit of the contract, the city has broken it. It matters not that the promise was to pay in a manner not authorized by law. If payments cannot be made in bonds because their issue is *ultra vires*, it would be sanctioning rank injustice to hold that payment need not be made at all. Such is not the law. The contract between the parties is in force, so far as it is lawful.'"

This case of Hitchcock vs. Galveston was cited in the late case of the District of Columbia vs. Lyon, 161 U. S., p. 200. In this latter case the city and District of Columbia issued and sold certificates to raise funds to defray the cost of paving, which were payable out of special taxes to be assessed upon the property bordering on the line of the improvement. The work was done by the contractor, but the taxes could not be collected on account of a failure to make lawful assessments. To a suit on the certificates the District of Columbia pleaded that it was not liable, contending that the contractor had agreed to look solely to the special taxes for payment. The Supreme Court of the United States, in affirming the decree of the Supreme Court of the District, maintaining the validity of the certificates, held that the effect of the law:

"Was to charge the municipality, not with direct indebtedness for the work done under its ordinance, but with a duty to work out a payment thereof by seeing to it that

the cost should be charged as a lien and collecting the special tax from the lot owners."

And a failure to perform this duty made the district liable.

And the city's express warranties contained in the bill of sale under which the warrants sued on were issued (R. p. 102) are equally conclusive against her. Her agreement not to obstruct or impede, but, on the contrary, to facilitate by all lawful means the collection of the drainage taxes until the warrants were fully paid, and apply said collections solely to the payment of said warrants, is an express warranty, as strong as human language can make it, that there was a tax to pay said warrants, and that the same was available for that purpose. Any other construction would make said covenant a meaningless affair.

And upon these warranties, implied and expressed, Van Norden relied when he sold his property and accepted the drainage warrants in question therefor. This most clearly appears from the evidence of Van Norden (R. p. 247), and from the evidence of E. C. Palmer, (R. p. 251) who had loaned Van Norden large amounts of money to carry on his drainage work and was familiar with Van Norden's affairs. This evidence is uncontradicted.

And the evidence of said Van Norden further shows that the city officials assured him that the city would go on and complete the drainage work, and that their desire for getting the plant and franchise was that they could do said work cheaper than the price paid to him (p. 248). And the consequence of such representations thus relied upon

is thus stated by the Supreme Court of the United States in Dickerson vs. Colgove ,100 U. S., page 320:

"The law on this subject is well settled. The vital principle is, that he who by his language or conduct induces another to do what he would not otherwise have done, shall not subject such person to loss or injury. Such change of position is strictly forbidden. It involves fraud and falsehood and the law forbids both."

As to the validity of the assessment on streets, squares and other public property duly reduced to judgment by Courts of competent jurisdiction,

1st. We think the validity of these assessments has already been passed upon in this Hon. Court. The assessment against the City of New Orleans are alleged in the 11th paragraph of the bill (p. 10 of the record) to be as follows: 1st District, $223,110.60; 2nd District, $190,-885.47; 3rd District, $207,441.46; 4th District, $65,956.77; and the homologation ow said assessments—that is, their reduction to judgment—are set out in the 10th section of said bill, while the proceedings of said homologations and the detailed items of assessments making up the above amounts, are given in the exhibits filed with and made part of said bill, as follows: 1st District, pp. 21 to 45, and the detail of the items making up said sum in said district, pp. 37 to 45; 2nd District, Parish of Jefferson, pp. 46 to 57, and detail of the items, making up the portion of said amount in said parish, pp. 51 to 52; 2nd District, Parish of Orleans, pp. 58 to 70, and detail of the items, making up the portion of said amount in the Parish of Orleans, pp. 63 to 65; 3rd District, 70 to 80, and detail of the items, making

up said amount, pp. 75 to 76; 4th District, pp. 80 to 91, with detail of the items, making up said amount in said district, p. 90.

To the bill averring the above assessments on streets and squares there was, as already stated, a general and special demurrer, and after the Circuit Court had dismissed said bill and an appeal had been taken from its decree to said Circuit Court of Appeals, this precise question of the validity of said assessments was fully argued before, and submitted to that Court, and upon the basis, and solely upon the basis that said assessments and the judgments based thereon were valid, that Court submitted this question—which is its vitals carries said validity—to-wit: "Is the City of New Orleans * * * * estopped from pleading against the Complainant the issuance of bonds, * * * to retire drainage warrants * * * as a discharge * * * from her own liability to that fund as assessee of the streets and squares?"—not an imagined or supposed obligation, but a real, actual, and subsisting obligation as assessee of said streets and squares. These assessments on said streets and squares and the judgments of Court thereon being alleged in the bill, set out in detail in the exhibits thereto attached and made part thereof, the Court of Appeals must necessarily have found they were valid and imposed liability before it propounded said question to the Supreme Court. If this is not the fact then said Court of Appeals was only experimenting with this Honorable Court and submitted to it a moot question, and was making this august tribunal but a moot court, and, as such, it decided only a moot case. Surely this was not and could not be the case. The lan-

guage of the Supreme Court of the United States in Bissel vs. Spring Valley Township would instantly reject such an idea, where at the bottom of page 232 it said:

"Courts are not established to determine what the law might be upon possible facts, but to adjudge the rights of parties upon existing facts; and when their jurisdiction is invoked, parties will be presumed to represent in their pleadings the actual, and not supposable, facts touching the matters in controversy."

The affirmative answer to the above question is a declaration of the existence and validity of the assessments levied for a local improvement, from which the city was not discharged by the bond issue, and if not then the Court—as above stated—merely decided a moot case and without any consideration of the vilidity of the assessments on which said question was based.

And here we beg to observe, that the opinion of the Circuit Court, Peake vs. New Orleans, 38 Fed. Rep., p. 781, relied upon by defendant, instead of being a declaration of the invalidity of the assessments on the streets and squares, is an unwilling admission of their liability as declared by the highest Court of the State and the Legislature of the State.

2d. But suppose we are mistaken in the above and that the city's liability on the judgments of the State Courts based on the assessments on the streets and squares has not been already decided, or at least, recognized by this Court, then we say that question cannot now be entered into for various reasons, and among them as follows:

(a). There is no longer any assessment, but the same

has been merged into a judgment, just the same as promissory notes cease to exist, or have any force from the moment they are reduced to judgment, Oakey vs. Murphy, 1 An., p. 372; Denniston vs. Payne, 7 An., 334. In W. Feliciana R. R. Co. vs. Thornton, 12 An., p. 738, the Court said:

"The promissory note which the plaintiff sued upon in Mississippi has no longer a legal existence; it is merged in the judgment, and it can only be severed from it by the reversal or recision of that judgment. Abat vs. Buisson, 9 La., 418; Oakey vs. Murphy, 1 An., 372; Small vs. Creditors, 3 An., 386; Denniston vs. Payne, 7 An., 333.

(b) The assessments on the streets and squares being reduced to judgment by the State Court, but two questions are open for inquiry, viz.: jurisdiction, and day in Court. Christmas vs. Russel, 5 Wall, 305; Thompson vs. Whitman, 19 Wall, 457; Renaud vs. Abbott, 116 U. S. A., p. 277.

In Mills vs. Duryea, 7 Cranch, p. 481, it was expressly held *"nil debit* is not a good plea to an action founded on a judgment of another State." Surely this is conclusive of the matter here conteded for. And that the Court had jurisdiction and the city day in Court, the copies of the proceedings from the State Court show said proceedings were had in the Courts designated by the statutes of the State. And especially did the city have a day in Court for the judgment of homologation in the Third and Fourth drainage districts for the whole amount, and for the nine instalments of the assessment in the First District was rendered at the suit of the city herself, (R. pp. 72 to 88).

In the case of the United States vs. New Orleans, 98 U.

S., p. 381, there had been a judgment rendered against the city on certain bonds, and a petition for a mandamus was filed to compel the payments thereof, and various objections were raised to the legality of said bonds, and it was contended their payment was confined to a certain fund, but the Court, at page 395, said:

"In the present case, the indebtedness of the City of New Orleans is conclusively established by the judgments recovered. The validity of the bonds upon which they were rendered is not now open to question. Nor is the payment of the judgments restricted to any species of property revenues, or subject to any conditions. The indebtedness is absolute. If there were any question originally as to a limitation of the means by which the bonds were to be paid, it is cut off from consideation now by the judgments. If a limitation existed, it should have been insisted upon when the suits on the bonds were pending, and continued in the judgments. The fact that none is thus contained is conclusive on this application that none existed."

And a judgment rendered upon an assessment for taxes is just as conclusive as a judgment rendered upon any other cause of action, and cannot be attacked collaterally. In Driggers vs. Cassady, 71 Ala., page 533, the Court said:

"It is no objection to the application of this principle that the present is a proceeding to enforce the collection of delinquent taxes. While great accuracy is exacted in all such proceedings, and strict rules are applied for the protection of the taxpayer, this principle, forbidding the collateral assailment of judgments, has often been successfully invoked in actions of this nature. It has accordingly

been decided that there is no sound reason why judicial proceedings for the enforcement of taxes should be exempt from its influence. Burroughs on Tax, 285-6; Freeman on Judg., Sec. 135; Wellshear vs. Kelley, 69 Mo., 343; Ethel vs. Foote, 39 Cal., 439."

In Cadmus vs. Jackson, 52 Pa. State, page 295, there had been a judgment for taxes which had been paid before any lien was entered for them, yet the Court held that after judgment had been entered for said taxes, said judgment could not be attached collaterally, and, at page 305, said:

"It is answered, in the first place, that the taxes were paid before the lien was entered for them, and that all judicial process founded upon paid taxes was null. This answer cannot prevail, because there is the judgment for the taxes in full force, and it cannot be collaterally impeached."

Free on Judgments, Sec. 135, said:

"Jurisdiction being obtained over the person and over the subject matter, no error in its exercise can make the judgment void. The authority to decide being shown, it cannot be divested by being improperly or incorrectly employed. Error of decision may be corrected, but not so as to reach those who have in good faith relied upon its correctness. The same rules apply to actions to recover delinquent taxes as in other cases, in respect to collateral attacks. It cannot be shown, to avoid the effect of such judgments, that the taxes were previously paid. Neither will such judgments be any the less effective because it appears from the judgment roll that the assessment was illegal and void."

In the case of Mayo vs. Foley, 40 California, p. 281, there had been a decree based on an assessment which on its face was void, and under such decree a sale had been made and the property was purchased by the plaintiff, who brought the above action to recover possession of property purchased. The Judgment was for the defendant and an appeal was taken and to the Appelate Court where the appellee contended that inasmuch as the tax decree showed it was based on a void assessment the sale thereunder was also void, but the Court decided otherwise and gave a new trial, and, at page 282, said:

"To establish title in himself to the demanded premises the plaintiff offered in evidence at the trial certain judicial records, by which it appeared that the people regularly instituted an action against the defendant, Foley, and also the demanded premises themselves, for the recovery of certain delinquent taxes, and that Foley and the real estate were regularly served with process in the action; that a general default was made, and it was by the Court, thereupon, adjudged and determined that the allegel taxes had been duly and properly assessed, and were delinquent; and th premises were directed to be sold by the Sheriff of Sacramento County to satisfy the judgment and costs. The sale was made by the Sheriff in substantial pursuance of the decree, and the plaintiff became the purchaser at the sale, and ultimately received the Sheriff's deed for the premises.

"These records were, however, excluded by the Court below, upon the objection made by the defendant that it appeared therefrom that the original assessment was void,

and because the decree itself was void, in that it directed the several lots to be sold together for the aggregate amount of taxes upon all of them, instead of directing each lot to be separately sold for the tax due upon each.

"The Court below erred in excluding the evidence upon that ground.

"If the sale had been, in fact, made upon an alleged assessment for taxes and a subsequent delinquency in their payment, the purchaser at such sale would have been bound to maintain the legal validity of the assessment in the first instance, and of all the proceedings thereafter had, through which he claimed to have derived title to the premises. But the sale here was had pursuant to a decree of a Court of competent jurihdiction, entered in due form of law, and after the requisite service of process had been made. It is true that the decree itself was entered because of the alleged delinquency in the payment of the tax, to the regularity in the levy, of which objection is now sought to be made. But the legality of the assessment in the first instance, and the fact of the delinquency in its payment, were the very questions made in the suit which resulted in the decree itself, and it was directly determined and adjudged therein that these taxes were legally levied and were due and unpaid.

"This is onclusive alike upon Foley and the premises, of the truth of the matters so adjudged, until the decree shall be in some way reversed or set aside by direct proceedings had for that purpose.

"That no mere collateral inquiry upon this point can be allowed, however, is too well settled to require argument

or illustration to maintain. The purchaser of real estate at a sheriff's sale, in order to establish in himself such title as the defendant in execution had, is only held to show a judgment of a Court of competent jurisdiction (no matter if it be erroneous on its face), valid process issued to the sheriff therein, and a sheriff's deed made upon a sale thereunder."

And this case was affirmed and followed in the like case on Anderson vs. Rider, 46 Cal. 134.

And the law of Louisiana as to the conclusiveness of a judgment rendered by a Court of competent jurisdiction, after due notice, is the same. In the Succession of Quin, 30 An., p. 947, it was held:

"A judgment rendered by a Court of competent jurisdiction, and where parties have been duly cited, cannot be attacked in any collateral way, even by third persons not parties to it."

In Starns, et al., vs. Handot, et als., 42 An. 366, it was decided:

"A judgment rendered by a Court of competent jurisdiction, where the proper parties have been cited, must have full force and effect until set aside by direct action. It cannot be attacked collaterally."

This was clearly recognized by the plaintiff in Davidson vs. New Orleans, 34 An., p. 170, where she brought her direct action to have the drainage judgments as to her property rendered in operative.

But in the First District, for nine instalments of the assessment on streets and squares ($233,111.60), and in the Third District, for the full assessment on said streets

and squares ($207,471.46), and in the Fourth District, for full assessment on said streets and squares ($65,956.75), the judgment of homologation of the said assessments were rendered at the request of the city herself, and were, therefore, confessions of liability on such assessments on said streets and squares.

Such a judgment cannot be set aside for nullity by a party confessing its liability. Kilgore vs. Nicholson, 26 An., 633.

And the decree of homologation of said assessments in said First District was rendered by the Supreme Court of Louisiana, 27 An., p. 20, (Record, p. 28) and was afterwards affirmed by the Supreme Court of the United States; 96 U. S. R., p. 97, where it was declared the judicial proceedings therein had in the Courts of Louisiana did not deprive the assessees of their property without due process of law.

And there can be no doubt that the homologation of the assessment roll at the request of the city was a final and executory judgment against her. See Capdeville vs. Irwin, 13 An., p. 286.

3d. But suppose we are still mistaken in that this Court has recognized and passed upon said liability of defendant on the assessments on the streets and squares reduced to judgment, that the defendant has the right to attack said judgments of homologation collaterally, then we say that under the statutes and the settled jurisprudence of Louisiana said assessments were and are legal.

The statutes of 1858 required the commissioners to make a plan of their respective districts, designating the limits

thereof, the subdivision of the property therein contained and the names of the proprietors." Sec. 7, p. 3, of Statutes. And the Court was required by the same section to decree "that such portion of the property situated within said limits is subject to a first mortgage lien," etc.

By section 8 of the same statute each board was authorised and empowered to levy a "uniform assessment or assessments upon the superficial or square feet of lands situate within the draining section or district of such board." (Stat. p. 4.)

Similar language is also contained in section 2 of the law of 1859 (Stat. p. 6) which provides for an assessment to pay bonds which might be issued by the Drainage Commissioners, and in section 5 of the same act (Stat. p. 7), providing the manner in which money should be raised to maintain the drainage work after completion.

In the law of 1861 (Stat. p. 8), where provision is made for judgments to be entered against lands assessed and the owners thereof, "assessments made upon property within the limits" of certain territory is spoken of and the "names of the owners thereof" is required to be given. There is not a hint anywhere in these statutes that public property is to be exempted from assessment. All the property within the limits of the drainage district is to bear the burden of the assessments. And evidence is furnished that the public property and streets and highways were to be included by the language contained in section 8 of the act of 1859. (Stat. pp. 7 and 8.)

It is therein provided that the Boards of Commissioners shall at all times have access to any plans or parts of plans

of the City of New Orleans and Parish of Jefferson, "the same to include the street or streets, road or highway of any portion or section thereof to be drained, according to the provisions of this act and the acts to which this act is amendatory."

When we consider that these boards of commissioners were to make the assessments, the inference is strong that these plans, including streets and roads, were to be used to aid them in their duty of assessing said streets and roads.

And an assessment upon the streets and public property under the old drainage law of 1835 was declared legal by the Supreme Court of Louisiana in New Orleans Draining Company, praying for the confirmation of a tableau, 11 An., page 338, where at page 337 the Court said:

"While we feel the almost impossibility of doing justice among so many persons with conflicting interests, we are satisfied that whether we adopt the area or the value of the lots as the plan upon which the assessments is to be made, it will approximate the right so nearly that less injustice and injury will be done, by adopting either, than by sending the case back for prolonged litigation and further proof upon this question.

"The principle that it costs as much to drain one foot of land of little value as it does to drain an equal area of more value, and that were alike both benefited, prevailed as to the land below the ordinary level of high water in the lower coast. This seems to be recognized by the third section of the Act of 1839 which directed the appraisers in

making the distinction to take into consideration the extent of the individual properties.

"The large proportion of the enpense which by this view is thrown upon the city for these streets, meets in some measure that equity which has been urged upon our consideration, that as the work has been undertaken for the public good the public ought to bear the charge of it, notwithstanding the benefit to the owners of the soil."

In Marquez vs. The City of New Orleans, 13 An., p. 319, the Court expresaly held the City was owner of Claiborne Street (middle of neutral ground), and as such owner liable to pay for paving or shelling the street, just as the private owner on the opposite of said street was liable. The case is stated by the Court as follows:

"Plaintiff contracted with the City of New Orleans to level, grade and shell a tract twenty feet wide on Claiborne Street, on the north side of the middle ground of premenade of said street, from St. Bernard Avenue to the Elysian Fields Street, in the Third District, of the City, at the rate of $2.46 per running foot.

* * * * * *

"In the case at bar, as the city owns on one front, if she were not liable, then only one-half of Claiborne street and of streets similarly situated could be paved.

"The city is obliged to make and pay for one-half of the paving in the case at bar, not only from the effect of section 119 of the city charter, but also because the middle ground in Claiborne street is the property of the city and intended or dedicated as a public promenade and for the public good and enjoyment. It is then just when the

city has property of this character, that she should pay her proportion of expenses necessary for the construction of a public highway along the border of her property, and not coerce opposite proprietors to pay the whole, and thus tax them in particular to enable the community to enjoy a pleasant promenade and free circulation of air."

In this case Justice Spofford dissented from the reasoning of the Court, and said that in his opinion the city was not owner of the middle ground of Claiborne street, and that the same was a "public thing" and exempt from assessment, but concurred in the decree of the court on the ground that the city was liable on her implied warranty, under the authority by him cited, which is noticed under the head of estoppel and warranty.

In this case it is, therefore, clear that it was directly decided, and against the opinion of Justice Spofford, and the doctrine here contended for by the defendant that the City of New Orleans could be legally assessed on public property for a local improvement.

This case was directly followed in Correjolles vs. Succession of Foucher, 26 An., p. 362, where the Court at page 363 said:

"It seems that the only question in which the defendant is concerned, presented in this case, was decided in the case of Marquez vs. The City of New Orleans, 13 An. 320. In that case the Court held that the middle ground of Claiborne street belonged to the city as a *locus publicus*, and that the city was bound for one-half the expense of constructing a road on the north side of Claiborne street, the entire expense of which it was sought to impose upon the

proprietors on the north side. That case and the one at bar seem identical. With that view of the case the judge *a quo* decided in favor of the defendant, and we think correctly.

Both the above cases were examined and approved in Asphalt Paving Co. vs. Gogreve, 41 An., pages 259 and 260.

Besides, Act 30 of the law of 1871 expressly "confirmed" the assessments, as shown by the books of the first, second and third drainage districts, under the Acts of March 18, 1858, that of March 17, 1859, and the several supplementary and amendatory thereto." (Stat. Sec. 9, p .12.)

In the proceedings to homologate the assessment in the first district for the first instalment thereof, the proceedings were carried on at the instance of the original drainage commissioners, before they were succeeded by the Board of Administrators of the City of New Orleans, and the city appeared and appealed from judgment of homologuiesced in the judgment. (R. pp. 24, 37 to 41 and 266 to 269.)

No other opposition was ever made by the city to the entry of these judgments against her. On the contrary, judgment upon all except said first instalment in said First District, and upon the entire assessment in the Second District, both in the Parish of Orleans and Jefferson, that is, upon nine instalments in the First, and upon all assessments in the Third and Fourth districts, were rendered upon the application of the city herself.

And when, as a matter of precaution, it was thought desirable to revive said judgments of homologation (for it

was in fact not necessary to revive them), because the statute under which they were levied (Stat. page 4, latter part of Sec. 7), declared they "should attach to said property until the amount assessed and the interest thereon shall have been paid in full," the city herself went into Court and filed necessary proceedings (which are still pending), and prayed for their revival, thus judicially admitting their validity without exception or qualification. (R. pp. 54 to 57; 67 to 68; 78 to 80.)

The effect to be given to the judicial declaration of a party, and even to those of the State, has been the subject of frequent investigation and decision in the courts of Louisiana. In Folger vs. Palmer, 35 An., p. 744, the Court said:

"Our jurisprudence has uniformly recognized and enforced the wise and salutary doctrine, which firmly binds a party to his judicial declarations, and forbids him from subsequently contradicting his statements thus made. (Farrar vs. Stacy, 2 An., 211; Gridly vs. Connor, 4 An. 416; Dunham vs. Williams, 32 An. 962; Gilmore vs. O'Neil, 32 An. 979; Dickson vs. Dickson, 33 An. 1370). The doctrine is so firmly sanctioned by both reason and justice that our courts have unhesitatingly extended it to the State itself. State vs. Taylor, 28 An. 460; State ex rel. Morgan, 28 An. 121; State vs. Ober, 34 An. 360."

In the State of Louisiana vs. Ober, 34 An., p. 361, the Court said:

"There is no question that were the original vendor a private individual, it would be precluded by such action from again claiming the land, and instituting suit for its recovery, on account of defects or irregularities attending

the proceedings under which he had first sold the property. He could not and would not, under such circumstances, be listened to. Plaintiff's counsel contends that this rule does not apply to the State, and es pecially as the bene does not apply to the State, and especially as the bene an interest in the lands embraced therein.

"We think otherwise. In the case of the State vs. Taylor, 28 An. 462, it was held: 'That the State is bound by her pudicial pleadings and admissions the same as private persons, and is entitled to no greater right or immunity as a litigant than they are. Nor is this rule of law varied by the fact that there are others interested in the subject matter of the proceedings conducted by the State. If any persons have been injured by the action of the Stat, good faith and a sense of justice should incline the State to make reparation as all other fiduciaries should do under like circumstances, even admitting their existence; but such conditions cannot effect the rules of law nor modify the liability and status of the State in a judicial proceeding in a suit where the State seeks to recover the lands as owner, and where the legal title under the Federal grant was vested solely in the State."

The matter of local assessments has been the subject of judicial inquiry and decision in other States. In the ase of County of Mc Lean vs. City of Bloomington, 106 Ill., page 209, all the objections here raised were there considered and decided, and said objections and their decision are so clearly stated and answered that we cannot do better than quote the language of the court, beginning at page 213, where the court said as follows:

"The objections may be included under three heads: First, the property is exempt from special assessments;

second, the statute under which the city is proceeding does not authorize any assessment against property of the county; third, the judgment cannot be enforced by sale of the property, and not other mode of enforcing the payment of such judgment can be resorted to.

"It is not claimed the first objection has the direct sanction of the statute in its support, but the contention is, such property is expressly exempt from taxation, and special assessments are included within the meaning of the word taxation. We have been too long and too firmly committed to the doctrine that exemption from taxation does not exempt from special assessments, to now admit that it is even debtable. Trustee, et al., vs. City of Chicago, 12 Ill., 403; Higgins vs. City of Chicago, 18 id. 276; City of Chicago vs. Colby, 20 id. 614; City of Peoria vs. Kidder, 26 id., 352; Wright vs. City of Chicago, 46 id. 44; Nix. v. Post. id. 121. The distinction between taxation and special assessment is, also, clearly made in our present Constitution, (secs. 1-5, 9, art. 9,) and while providing that the General Assembly may exempt the property of the State, counties and municipal corporation from the former, (section 3, supra.), makes no such provision in regard to the latter, but on the contrary, by section 9, supra., authorizes the General Assembly to vest the corporate authorities of cities, towns and villages with power to make local improvements by special assessments,' without any restriction as to the property to be assessed.

"The second objection rests entirely upon the assumption that to include the property of the counties it should be expressly named—that language, however comprehensive, in general terms only, is not sufficient. The rule held by this court is directly the reverse of this assumption. The

exemption, not the inclusion, must specifically appear. General language, like that under which the city is proceeding, includes the property of counties, cities, etc., as well as private property. Higgins vs. City of Chicago, supra; Scammon vs. City of Chicago, 42 Ill., 192; Cook County vs. City of Chicago, 103 id. 646.

"There is not the slightest analogy between Fagan vs. City of Chicago, 84 Ill., 227, and the People vs. United States of America, 93 id., 30, cited by counsel for appellant. There the question related to the right of one sovereignty to invade another. The relation between the cities and villages and counties is totally unlike that between the government of the State and the general government of the United States. Cities, villages and countries are mere agencies of the State, by and through which to conveniently administer local government. In the absence of express constitutional restraint the General Assembly might abolish them, one or all, and substitute other and entirely different agencies in their stead. We have repeatedly held that, though the fee of streets is in the city, she has no private property in them, but holds them in trust for the use of the public—not the citizens of the city alone, but the entire public, of which the Legislature is the representative. Chicago vs. Rumsey, 87 Ill., 355; The People, ex rel., vs. Walsh, et al., 96 id. 232; City of Chicago vs. Union Building Association, 102 id. 379. So here, instead of one sovereignty invading another, as in the cases referred to, we have the General Assembly simply authorizing that property held by one of its agencies shall be burthened with a charge for the benefit of another of its agencies to the extent it has been benefitted by that agency, in regard to a matter in which the citizens and property

owners within the territorial limits of such last named agency has no exclusive interest, but only an interest in common with the entire public. The question relates purely to the right of the State to apportion a public burden upon public, in common with private property, in proportion to the benefits conferred upon that property, and in nowise involves any questions conferred upon that property, and in nowise involves any questionh of conflicting sovereignties.

"The remaining objection, we think, involves no serious difficulty, though, at first blush, it may seem to do so. We certainly do not hold the court house square may be sold and the title passed to private parties, or to the city. In Taylor vs. The People, ex rel., 66 Ill., 322, we held, explaining Scammon vs. The City of Chicago, supra., that in such cases the amount should be paid out of the treasury. Should this not be done, mandamus would lie to compel it. (City of Olney vs. Harvey, 50 Ill., 453). And it seems that the judgment at law must precede the mandamus, the latter being in the nature of process of execution of the former. The People ex rel. vs. Board of Supervisors, 50 Ill., 213.

* * * * * *

"Some objection is taken to the form of judgment, but this we regard as of no moment. No execution can issue upon the judgment, nor can the court house square be sold by virtue of it. If it shall not be paid without coercion, that coercion must be by mandamus against those who properly represent the country, and are derelict in the performance of their duty in that regard."

In Higgins vs. The City of Chicago, 18 Ill., at page 280, the court said:

"The assessment of public taxes, or special assessments for public improvements, upon the public property of the State, county or municipal corporations, is a mere question of policy. The power exists to make it bear its share of the one or the other. Canal Trustee vs. Chicago, 12 Ill., R. 405; Ross vs. Mayor of New York, 3 Wend. R. 335.

"The language authorizing an assessment on property for benefits from laying or extending streets (Chapter Cap. 6, Sec. 2) is very broad and comprehensive, and no reason is apparent why the public square may not receive a due share of the benefit with any other realty on the same street. The corporation of the city or the county may, if not specially exempted, justly pay a part of the assessments proportionate to the benefits conferred by the improvements. Such mode of apportioning the burthen is very just and reasonable, for under it alone many taxpayers will contribute a share for the benefits bestowed on their property in common, who, otherwise, would pay nothing, and yet enjoy the benefits resulting from the improvement."

And the distinction between taxation and local assessment has been often declared by the Supreme Court of Louisiana. In the case of Charnock vs. Levee Co., 38 An., p. 326, the court said:

"But in the course of time the matter has been considered over and over again in our own courts, and in the courts of sister States and by an inveterate course of decision, with rare exception, it has ripened into the settled principle of constitutional construction, that local assessments or contributions provided for the purpose of constructing public works for the advantage of particular districts and levied on property benefited thereby and with reference to such benefit, are not considered as taxes

within the meaning of constitutional restrictions on the power of taxation. Board vs. Lorio Bros., 33 An., 276; Railroad vs. Board of Health, 36 An., 666; Burroughs on Taxation, Chap. 22; Cooley on Taxation, Chap. 20."

See also Barber Asphalt Co. vs. Gogreve, 41 An., pages 263, 264 and 265, where a large number of authorities from various States and text writers are collected and cited, and among them the Drainage Case, in the 11th An., p. 371, arising under the Act of the Legislature of 1835.

The effect of a statute similar to the provision of Act 30 of 1871, under which the previous assessments were confirmed and made exigable, has often been declared by the Supreme Court of the United States. In New Orleans vs. Clark, 95 U. S., p. 644, the court, at pp. 654 and 655 said:

"The Constitution of Louisiana of 1868, which provides that no retroactive law shall be passed, does not forbid such legislation. A law requiring a municipal corporation to pay a demand which is without legal obligation, but which is equitable and just in itself, being founded upon a valuable consideration received by the corporation, is not a retroactive law—no more so than an appropriation act providing for the payment of a pre-existing claim. The constitutional inhibition does not apply to legislation recognizing or affirming the binding obligation of the State, or of any of its subordinate agencies, with respect to past transactions. It is designed to prevent retrospective legislation injuriously affecting individuals, and thus protect vested rights from invasion."

This doctrine was fully recognized in Read vs. Plattsmouth, 107 U. S., where the court, at page 575, quotes the above language.

The same principle was recognized and applied in Gran-

ada County Supervisors vs. Brogden, 112 U. S., p. 261, where the head-note is as follows:

"A municipal subscription to the stock of a railroad company or in aid of the construction of a railroad, made without authority previously conferred, may be confirmed and legalized by subsequent enactment, when legislation of that character is not prohibited by the Constitution, and when that which was done would have been legal had it been done under legislative sanction previously given."

See also Anderson vs. Santa Anna, 116 U. S., pages 356 and 364.

And these assessments against the City of New Orleans are not effected by the fact, that perhaps, the public property on the area of which they are levied cannot be sold in default of voluntary payment by the city, to pay said assessments.

It was claimed in the Court of Appeals that even if the various drainage acts imposed an obligation on the city to pay the special taxes assessed against it as quasi owner of the streets, squares and public places, and if the Act of 1871 confirmed these assessments and made them exigible, i. e., payable by the city, still these status are inoperative because they prescribe no mode for the enforcement of the obligation, otherwise than by the foreclosure of the tax privilege, and the sale of these public places, which are beyond the power of either the legislature or the municipality to alienate. But we are relieved of all difficulty on this point by the decision of the Supreme Court in United States vs. New Orleans, 98 U. S., 381, since affirmed in Wolff vs. New Orleans, 103 U. S., 358, involving the liability of the city to pay the principal of bonds issued under authority of a statute of the State of Louisiana, which

provided for the levy of taxes to pay the yearly interest due thereon, but made no provision for the payment of the principal at maturity. Mr. Justice Field in discussing the question states that when municipal corporations are created the power of taxation is vested in them as an essential attributes for all the purposes of their existence, unless its exercise be, in express terms, prohibited, and that in a city like New Orleans, situated on a navigable stream, their powers are usually enlarged so as to embrace the building of wharves, docks and levees, and roads, and that all of them require the expenditure of considerable money, which must ordinarily be raised by means of taxation. In conclusion, says the learned Justice: "For the same reason, "when authority to borrow money or incur an obligation "in order to execute a public work is conferred upon a "municipal corporation, the power to levy a tax for its "payment or the discharge of the obligation accompanies "it; and this, too, without any special mention that such "power is granted. This arises from the fact that such cor-"porations so seldom possess—so seldom, indeed, as to be "exceptional—any means to discharge their pecuniary ob-"ligations except by taxation."

The drainage assessments in this case being made obligations of the city it must be presumed upon, the same ground, that the legislation ontemplated that they should be discharged by the exercise of the power of taxation, rather than by the sale of the public places. Indeed, we may safely assume that these public places were not intended to be taxed in the ordinary sense, but that their area was placed on the tax rolls as a mere measure of the liability of the city to contribute to the cost of drainage, which was to be discharged by the levy of a general tax

in the customary mode. This view of the matter leaves nothing in the argument that the assessments are void because they lead to the sale of public things, which are beyond the power of a legislature to alienate.

As well might it be contended that a debt secured by a mortgage is invalid because the mortgage cannot be enforced.

In conclusion, on this point, we submit that when the legislature in 1876 authorized the city to purchase the property of Van Norden and to pay the price out of drainage assessments, it at the same time, by necessary implication, empowered and required the city to discharge its own obligation to the fund out of which the price was to be paid, through the exercise of the power of general taxation. This was directly held in County of Mc. Lean vs. City of Bloomington, 106 Ill., 209, quoted above.

IV.

As to the amendment of the constitution of the State, adopted in 1874 and going into effect on January 1st, 1875.

This amendment reads as follows:

"The City of New Orleans shall not hereafter increase her debt in any manner or form, or under any pretext. After the 1st of January, 1875, no evidence of indebtedness or warrant for the payment of money shall be issued by any officer of said city except against cash actually in the treasury; but this shall not be so construed as to present a renewal of matured bonds at par, or the issue of new bonds in exchange for other bonds, provided the city debt

be not thereby increased, nor to prevent the issue of drainage warrants to the transferee of contract under Act No. 30 of 1871, payable only from drainage taxes, and not otherwise."

The contention is that the act of the Legislature of 1876, which authorized the city to purchase the drainage plant and franchises is null and void, because it had the effect of increasing the debt of the city in violation of the supposed prohibition contained in said constitutional amendment of 1874.

One answer to said ontention is, that the assessments, both against the city and individuals (which constitute the debt due by said city from which said warrants are to be paid) were all in existence long prior to the adoption of said amendment, and were levied and reduced to judgment as follows:

That in the First District was levied on September 13, 1861, (R. p. 110) and reduced to judgment for the first instalment thereof on March 11, 1863, (R. p. 24) and for the remaining instalments on Mar 21, 1874. (R. p. 28.)

That in the Second District was levied March 11, 1861, (R. p. 111) and for that part of said district lying in the Parish of Jefferson was reduced to judgment March 15, 1869, (R. p. 50) and for the part of said district lying in the Parish of Orleans, was reduced to judgment November 16, 1868. (R. p. 62.)

That in the Third District was levied June 11, 1872, (R. p. 111) and was reduced to judgment November 13, 1872. (R. p. 74.)

That in the Fourth District was levied November 19,

1872, (R. p. 112) and was reduced to judgment March 15, 1873. (R. p. 89.)

It seems to us that by its clear and express terms the amendment excludes from its operation the liability of the city, whatever such liability may be, growing out of its relation to drainage matters. The ordinance left, and intended to leave untouched all such liability. It affirmed the existence of the drainage fund in all its component parts, including the liability of the city as assessee of the streets, squares and other public places, which constituted nearly one-half of the fund; and it affirmed that the fund so established was applicable to the payment of all warrants drawn against it for drainage purposes, and incidentally recognized the validity of the Act of 1871, which confirmed and made exigible, *i. e.*, payable, the assessments against the city, as they appeared in the various tableaux and judgments rendered thereon. And lastly, it recognized and established the validity of the drainage contract, and affirmed the right of the city to issue, and of the transferee of the contract to receive warrants against the fund, as the Supreme Court of the State declared in 27 A. 497; where the court at page 499 said:: "The transfer, whether in pledge or in full property made to him by said company, has been recognized by the Legislature. . . . Act 22 of the Act of 1874, proposing an amendment to the Constitution, limiting the debt of New Orleans, and is now a part of the organic law of this State."

No other construction can be given the amendment without imputing to its authors the intention of defrauding

those who might deal with the city under its invitation and permission.

Yet the Court is asked to hold by construction that a constitutional amendment which authorized the city to draw warrants against this drainage fund, operated to destroy and render it valueless by prohibiting the city from paying into the fund the taxes out of which the warrants were to be satisfied Authority to draw warrants against the fund necessarily carried with it by implication a duty and obligation on the part of the city to apply the drainage taxes, including those the city itself owed to their payment. These taxes being debts of the city at the date of the adoption of the amendment, cannot by any course of reasning be included in the clause prohibiting an increase of the indebtedness of the corporation after January 1, 1875. The amendment, even if it had provided in express terms that no debt of the city of New Orleans should be valid, would be construed to apply to future transactions only, for it is a fundamental rule of interpretation that laws apply to the future and not the past.

McEwen vs. Dew, 24 H. 242.

But construing the amendment from a broader standpoint and by the light afforded by the circumstances under which it was adopted, it seems clear to us that the authors intended to exclude all matters of drainage from its operation, and to leave the city free to carry out the plan of improvement then in course of execution. The drainage work had been in progress during three years and was yet unfinished, and we think it may fairly be assumed that the purpose of inserting a clause in the amendment authoriz-

ing the city to draw warrants, payable out of drainage taxes, was to permit the city to complete the improvement and to use the drainage fund to its full extent for that purpose, as provided in the legislation then in force. The powers and duties of the city in this respect were neither abridged in terms, nor increased, but were on the contrary expressly continued and affirmed.

It is contended, however, by the learned counsel for the defendant that the assessments against the city are void and do not constitute a debt of the city, and that, therefore, the act of 1876, authorizing the purchase from Van Norden increased the debt of the city contrary to the prohibition contained in the amendment, and for that reason is void.

Our answer to this is that even if the drainage taxes assessed against the city were not debts, the amendment simply prohibits an increase of the city debt after January 1, 1875, but imposes no limitation on its right to contract an indebtedness after that date, unless its debt should thereby be increased in excess of the amount it then owed. Whether, therefore, the act of 1876, authorizing the purchase increased the debt, is a question of fact, which can only be determined by evidence showing the amount of the debt on the first day of January, 1875, and on the 6th of June, 1876, when the purchase was made. Neither the pleadings nor the proofs in this case show these facts. If, therefore, the act of 1876 did in fact for the first time impose on the city a liability for drainage taxes to the extent of $300,000, as contended by defendant's counsel, it does not follow that the debt of the city was increased thereby.

Certainly, this Court cannot assume the existence of the fact to support a mere suggestion that a law of the State is unconstitutional. On the contrary, courts always indulge the presumption that the legislature before passing a law, the constitutionality of which depends upon the existence of particular facts, found the facts to be such as to warrant the legislation.

In Cooley's Constitutional Limitations (5 Ed. 222) the author says:

"If evidence was required, it must be supposed that it "was before the legislature when the act was passed; and if "any finding was required to warrant the passage of the "special act, it would seem that the passage of the act "itself might be deemed equivalent to such finding." A very full discussion of this question will be found in the case of United States vs. Demoines, etc., 142 U. S. 544, to which we refer the Court.

But it can make little difference whether the act of 1876 was constitutional or not, because defendant has had the benefit of the act of the legislature of which he now complains, in the acquisition and enjoyment of property, acquired at a purchase made in pursuance of the provisions thereof.

In Daniels vs. Tierney, 102 U. S., page 415, the Court, at page 421 said:

"It is well settled as a general proposition, subject to certain exceptions, not necessary to be here noted, that where a party has availed himself, for his own benefit, of an unconstitutional law, he cannot in a subsequent litigation with others, not in that position, aver its unconstitutionality as a defense, although such unconstitutionality may have been pronounced by a competent judicial tribunal

in another suit. In such cases the principle of estoppel applies with full and conclusive effect."

If the act of 1876 was in fact unconstitutional, the City of New Orleans contracted to purchase in error of law. D'Aguesseau, in his dissertation on Mistakes of Law, printed in Vol. 2 of Potier on Obligations, p. 350, says:

"Error of law ought not to give any person a title of "acquisition; the reason is evident, and Cujas comprises it "in his Commentary on Law, 8 ff. *de juris facti ignorantia*, "otherwise an ignorance of law would be an advantage to "one making a mistake. * * * Hence those "solemn definitions of law; ignorance of the law does not "profit those who are desirous of acquiring an advantage."

Domat, after declaring that error of law is not sufficient as an error of fact is, to annul contracts, says: "(1) If "error, ignorance of law, be such that it is the only cause "of the contract in which one obligates himself to a thing "to which he is not otherwsie bound, and there be no other "cause for the contract, the cause proving false, the con- "tract is null. (2) This rule applies not only in preserv- "ing the person from suffering a loss, but also in hindering "him from being deprived of a right which he did not know "belonged to him. (3) But if by an error or ignorance of "the law one has done himself a prejudice which cannot be "repaired without breaking in upon the right of another, "the error shall not be corrected to the prejudice of the "latter." See note at foot of Sec. 139, 1 Story Equity Jur.

Says the Supreme Court in Griswold vs. Hayard, 141 U. S. 284: "Mere mistakes of law stripped of all other "circumstances constitute no ground for the reformation "of written contracts."

And the law of Louisiana is in harmony with these principles, for Article 1846 of the Civil Code declares that error at law can never be alleged to acquire the property of another.

V.

Prescription of Five Years and Ten Years.

As to the prescription of five years claimed under Article No. 3540 of the Civil Code:

This article, under the settled jurisdiction of the State, applies only to unconditional promises to pay a fixed sum of money on a day certain, whether the obligation be negotiable under the law merchant or not. Conditional obligations which lack these essentials characteristics have never been held to come within its provisions. Defining what is a promissory note within the meaning of the article, the Supreme Court of the State, in Bank of La. vs. Williams, 21 An., 121, describes it to be "a written agreement by one person to pay another person therein named, absolutely and unconditionally, a certain sum of money at a time specified therein." In Thompson vs. Simmons, 22 An. 450, the same definition is again given, the Court holding that an instrument by which a party promised to pay a debt out of a crop, if he raised one, without fixing a definite time of payment, was an obligation contracted on both a suspensive and protestative condition, having none of the characteristics of a note, but giving rise to a personal action subject to the prescription of ten years under Article 3508 of the Civil Code. The same rule was followed by the Court in Bird vs. Livingstone, 1 Rob. 183, in dealing with an order payable conditionally out of a particular

fund, as the warrants are in this case. So, in Jewett vs. Irwin, 9 La. 231, it was held that an agreement of an agent to collect and pay over the proceeds of notes placed in his hands, as it did not bind him absolutely as a debtor, did not come within the prescription of five years, as provided in Article 3540 of the Code. And in Davidson vs. New Orleans, 34 An., at page 177, the Court said of the class of obligains in suit, as follows: "Payment of those warrants is, therefore, to be regulated by the provisions of the authority under which they were issued, and that authority expressly confines it exclusively to a special fund when realized and if realized. It is to take place *only* from the drainage assessments or taxes "and not otherwise." The payment, therefore, was to be completely hypothetical, contingent upon eventicalities susceptable of happening, or not, and was glaringly restricted to well defined limitations."

The warrants, therefore, did not become due until there was cash on hand to pay them, which seems not yet to have happened.

Independent, therefore, of the fact that the city was an express trustee, and as such excluded from pleading the statute, the prescription of five years has no application to these warrants.

As to the prescription of ten years, claimed under Articles 3544 and 3547 of the Civil Code, which relates to all personal actions except those otherwise specially enumerated in said Code.

The first thing to determine here is the relation between the city and the drainage fund. Under the Act 30 of 1871,

from the time she took charge, she was a trustee of said fund, compulsory and non-contractual, it is true—as was decided in the Peake case, 139 U. S .342, and again declared in the present case, 167 U. S., page 477; and after the contract of sale on June 7, 1876, a voluntary and contractual trustee, as was decided in the case of Warner vs. New Orleans (this case), where she voluntarily contracted:

"Not to obstruct or impede, but, on the contrary, to facilitate, by all lawful means, the collection of the drainage assessments as provided by law until said warrants have been fully paid ,it being well understood and agreed by and between the said parties hereto that collections of drainage assessments shall not be diverted from liquidation of said warrants and expenses as hereinabove provided for, under any pretext whatsoever, until full and final payment of the same."

Whatever her relation before this date, she certainly after said date became, voluntarily, the trustee of an express trust, to-wit: (Perry on Trusts, Sec. 24), of the drainage tax assessments, and the law on this condition of things is, as declared in Lewis vs. Hawkins, 23 Wall, page 119, where the Court at page 126, said:

"As between trustees and *cestui que* trust, in case of an express trust, the statute of limitations has no application, and no length of time is a bar. Accounts have been decreed against trustees extending over periods of thirty, forty and even fifty years. The relations and privity between trustee and *cestui que* trust are such that the possession of one is the possession of the other, and there can be no adverse possession during the continuance of the relation. * * *

A *cestui que* trust cannot set up the statute his *co-cestui que* trust, nor against his trustee. These rules apply to all cases of express trusts. As between trustees and *cestui que* trust, an express trust, constituted by the act of the parties themselves, will not be barred by any length of time, for in such cases there is no adverse possession, the possession of the trustee being possession of the *cestui que* trust."

In Perry on Trust, this law is stated in Section 863 as follows:

"As between trustee and *cestui que* trust, in the case of an express trust, the statute of limitations has no application, and no length of time is a bar. Against an express and continuing trust, time does not run until repudiation or adverse possession by the trustee and knowledge thereof on the part of the *cestui*. Such a trust is only barred on the doctrine of prescription of twenty years, and so long as the relation of trustee and *cestui* continues unbroken, the possession of the trust is that of the *cestui*, and there can be no adverse possession for the time to run upon. The trustee must clearly repdiate the trust and assume an adverse position, without notice to the *cestui*, before the statute can begin to run. When these facts exist for twenty years an action to recover the land is barred; and when the relation of trust is denied, or time and acquiescence have obscured its nature, or acts of the parties raise the presumption unfavorable to its continuance, the lapse of time may be a ground for refusing relief. The mere fact that money due the *cestui* is allowed by him to remain in the trustee's hands, does not change the nature of the debt; it continues to be a trust debt, upon which neither bank-

ruptcy of the trustee nor the statue of limitations can take effect. Accounts have been decreed against trustees, extending over periods of thirty, forty and even fifty years. The relations and privity between trustee and *cestui que* trust are such that the possession of one is the possession of the other, and there can be no adverse claim or possession during the continuance of the relation.

Lord Justice Knight Bruce said that where one entered into possession as trustee, he could not be permitted to set up a possession or title in himself adverse to the *cestui que* trust.

It is the duty of the trustee, if he intends to claim the estate, to resign his trust and deliver the possession which he received as trustee. He will then be in position to maintain his claim, for no claim should be made through a breach of trust. And no trustee, while occupying a place of trust and confidence should be allowed to set up adverse title. The rule applies to all acting as trustees, whether regularly appointed or not. It also applies to all who stand in a fiduciary relation to others, as executors, administrators, guardians or agents. A *cestui que* trust cannot set up the statute against his *co-cestui que* trust nor against his trustee. If one hold title to land as security for money; and the money is paid to him and received, he cannot plead the statute as a bar to a bill for reconveyance. These rules apply to all cases of express trusts. After the termination of a trust a reasonable time is allowed for settlement, and then the statute begins to run. The statute does not run in favor of a trustee against his *cestui* while the latter is

in possession. After the statute begins to run in favor of the *cestui* the death of the trustee will not stop it."

And the City does not pretend that she has ever disavowed the trust first imposed on her by statute, and lastly voluntarily acknowledged and assumed in the act of sale. On the contrary, the answer filed in this case constantly asserts that she has, faithfully, and at all times performed her whole duty, by enforcing the collection of drainage taxes to the full extent of her power and ability, acts utterly inconsistent with repudiation of the trust. Beginning at page 192 declares:

"Subsequent to said Act of 1876, it applied itself with great diligence, and to the full extent of its abaility to improve and make serviceable, the canals, levees and other drainage work of said company and its assignee, and to drain the lands, and this defendant established a bureau, or office in the City Hall, and the holders of drainage warrants appointed an agent, who was placed in charge of the same * * * to proceed with the collection of drainage taxes, who gave such instructions as he deemed judicious, as to the collection of such taxes, which were always followed by the officials of the respondent," (the city) "and besides, respondent did all in its power to prosecute the collection of the same; and the service of the attorneys and executive officers of respondent in this behalf, were directed at all times to such collections * * * ; the drainage taxes were extended on the regular tax bills of this respondent, asserted and claimed in every account filed in the courts by administrators, executors, syndics and per-

sons exercising like authority, * * * and by said modes and others, collections were made and accounted for."

Similar assertions are found throughout the answer, and finally the city has filed schedules showing the collection and disbursement of drainage taxes up to June, 1891—all in affirmance of the trust. (R. pp. 319 to 349.)

The burden of the answer is, that while the city is a trustee for drainage taxes, and has executed her trust faithfully, by collecting assessments against private persons, she has not accounted for the taxes assessed against herself, because she does not legally owe them.

Nor does prescription run against the claim of a trustee as long as he remains in administration of the trust property. See Succession of Farmer 32, An. 1037, because the trustee cannot sue himself, and hence prescription remains suspended during the term of administration. At page 1041 the court said:

"Being incapacitated from judicially enforcing her claim by the law itself, prescription necessarily is suspended, and the doctrine of *contra non valentam*, etc., is clearly applicable to administrators, curators or tutors thus situated."

And on the other hand the administrator of a succession cannot plead prescription as long as he remains such, in discharge of his own liability. See McNight vs. Calhoun, 36 Ap. 408.

Nor are the taxes assessed for drainage purposes subject to any prescription.

In the case of School Directors vs. City of Shreveport, 47 An., 1310, the court at page 1312 said:

"The amount collected by taxation for a specific purpose is a trust fund. The application of the fund is usually enforced by mandamus. We cannot see the application of prescription to protect the municipal corporation from liability for the funds thus collected and withheld."

In Reed vs. His Creditors, 39 An., 115, the court held tax laws were *sui juris*, and that the provisions of the Civil Code under the title of prescription does not apply to taxes, citing State ex rel., Jackson vs. Recorder, 34 An., 178, and Davidson vs. Lindoff, 36 An., 765, and we take it to be a general rule that unless the law which a tax is assessed provides a limitation, none exists. The most conclusive case of all on this subject is that of Davidson vs. Lindoff, 36 Annual, where the Court, at page 766, recites the provision of the City Charter, as follows:

"Section 20 of the City Charter of 1870 provides: 'That the taxes assessed and levied by virtue of this act, * * * are hereby dec lared to be a lien and privilege upon said property, * * * and said lien and privilege shall exist in favor of the City of New Orleans * * * until the same shall be fully paid; and the same shall be paid in preference to all mortgages and encumbrances other than taxes due the State."

And then said:

"Under this law the tax privileges of the City of New Orleans were practically imprescriptable."

The statute under which the assessments herein were levied is even stronger than the above, for after providing for the creation of the mortgage to secure said assessments, declared in the latter part of the 7th section therof:

"Said lien, privilege and first mortgage shall take precedence over all mortgages, liens and privileges whatsoever, whether tacit, conventional, legal or judicial, and shall attach to said property until the amount assessed and interest thereon shall have been paid in full."

Surely under the authority of the last case the taxes involved in this suit are imprescriptable.

And so strictly is the statute of prescription construed, that it applies to future and not prior assessments. City vs. Vrigole, 33 An., 39; Succession of Dupuy, 31 An., 781; 34 An., 178.

There is no prescription applicable to drainage taxes, but in no event could such statute be pleaded by the City owing taxes while she was trustee, and a trustee who owes a debt to the trust is treated in law as if he had collected the same, and is charged with the amount as an asset in hand.

Perry on Trusts, Sec. 440; Stevens vs. Gaylard, 11 Mass. 269; Sigourney et al., Admr., vs. Wetherell, 6 Mat., 557-558; Leland vs. Felton, 1 Allen, p. 533; Commonwealth vs. Gould, 118 Mass., 307.

We then have a case of a trustee with trust money in hand claiming it is his by prescription of 10 years. Such a claim apart from its morality, and apart from its being shocking to the judicial sense, is equally bad in law, for it has never (until within a few years past) been claimed that the judgments based on the assessments on the streets and squares were not due, and in fact—as before stated—its plea of payment is the broadest admission of the debt due.

The City certainly admitted the debt was due in the First District in 1863, when a judgment was rendered against it, for the first instalment thereof, and it appealed therefrom and thereafter acquiesced in the judgment by abandoning its appeal. (R. pp. 266 to 269.) It certainly again admitted the other nine instalments due on said assessment when it filed the rolls therefor in Court and asked for their homologation, and when said rolls at its request were homologated. And certainly said assessments were due in said 1st and 2nd districts when they were confirmed and made exigible by Act 30 of 1876. The City certainly admitted her debt when she filed the rolls for the third and fourth drainage districts and procured their homologation in the said third and fourth districts. And she admitted said debt in the most solemn manner known to the law. She confessed judgment for the same.

The debt therefor, springing from the assessments on the streets and squares, is not only admitted, but judicially declared.

Of such a debt, Perry on Trusts, Section 440, declared:

"If the trustee himself owes the estate, he must treat his indebtedness as assets collected."

In Stevens vs. Gaylord, 11 Mass., 269, the Court said:

"As soon as the debtor is appointed administrator, if he acknowledges the debt, he has actually received so much money and is answerable for it."

In Sigourney and another Admr. vs. Wetherell and Others, 6 Metcalf, pages 557 and 558, the Court said:

"It is now well settled, whatever may have formerly been the rule of law, that a testator, by making his debtor

executor, does not give him the debt, by way of legacy, nor release or discharge it. In this respect he now stands on the same footing with an administrator. But as an executor or administrator cannot demand or receive payment of himself, and cannot sue himself, and yet is bound to account for his own debt,, that debt must be considered as assets. Where the same hand is to pay and receive money, the law presumes, as aginst the debtor himself, that he has done that which he was legally bound to do, and charges him with the amount as a debt paid. Whether the crediting of his own debt in his probate accounts, and even a decree of distribution upon them, where there has been no actual distribution under such decree, would be so far regarded as actual payment as to exonerate a surety, or discharge any other collateral liability, is a distinct question, the decision of which is not necessary in the present case. It is sufficient for the present case that the administrator is bound to account for his own debt, as a debt paid, and as assets, without act or ceremony."

In Leland vs. Felton, 1 Allen, page 533, the Court said:

"The liability of an executor or administrator to be charged as such in his account of administration for all debts due from himself to the person upon whose estate he administers has been frequently held by this Court. It was directly affirmed in the case of Stevens vs. Gaylord, 11 Mass. 269, where it was said: 'As soon as the debtor is appointed administrator, if he acknowledges the debt, he has actually received so much money, and is answerable for it. This is the result with respect to an executor, and the same reason applies to an administrator.' 'The con-

sequence is, that he and his sureties in the administration bond are liable for the amount of such a debt, in like manner as if he had received it from any other debtor of the deceased.' This case was followed by that of Winship vs. Bass, 12 Mass. 198, to the same effect; as were also the cases of Ipswich Manufacturing Co. vs. Story, 5 Met. 310, and Sigourney vs. Wetherell, 6 Met. 533."

And in Commonwealth vs. Gould, 118 Mass., at page 307, the Court said:

"The receiver was obliged by his bond to account for the moneys borrowed by him from the corporation before his appointment, and his omission to pay the amunot thereof to himself as receiver was a breach of the bond, for which he and his sureties are equally liable The case falls within the general rule of law, that when the same person is liable to paymoney in one capacity, and recover it and account for it in another, the law presumes that he has done what it was his duty and within his power to do, and holds him and his sureties responsible in case of his failure to do it. The rule has been aplied by this Court to cases of executors and administrators, assignees in insolvency and guardians."

Surely under no system of law could it be successfully contended that an agent or trustee, who has collected and holds the money of another, ever could become the owner thereof, or be discharged from liability to pay it to the rightful owner. Nothing short of payment would be a discharge.

And such payment—as we have seen—was never pretended until it was for the first time contended for in the

answer filed in the Peake case on March 19, 1888, and even this plea cannot prevail here as was decided by the Supreme Court and the Circuit Court of Appeals. 167 U. S., p. 467; 81 F. Rep. p. 650.

Under the settled jurisprudenct of Louisiana, the prescription of 10 years cannot prevail in this case, for it has not yet begun to run. As was decided in the Succession of Farmer, prescription does not begin to run in favor of the estate and against the administrator or executor, while the administration lasts, nor does it run in his favor, while said administration lasts, 36 An. 408. In fact it neither runs for or against said administrator, but is entirely suspended.

When we apply this law to this case ,what is the result? The averments of the answer and the accounts, furnished by the defendant, shows an uninterrupted administration from the time the City took charge of the drainage taxes in 1871 to 1891, and hence a complete interruption of prescription is applicable to a case like this.

Perhaps the most conclusive case against the defendant on the plea of prescription, is that of the Insurance Co. vs. Pike 32, An., 483. That, as this was a case for an accounting, and in the first case the Court held there was no prescription, which would protect an agent from accounting, and in the second case, after the account was filed, and showed more than 10 years had elapsed from the time the last money had been collected, th Court allowed the prescription of 10 years.

Both of the above decisions are against the contention of complainant. The former, because there is no prescrip-

tion against an accounting, and the second because the answer in this case, and the accounts filed, show the administration was continuous from 1871 to 1891.

But apart from the above, there is no prescription whatever applicable to taxes, as we have shown.

In the Lower Court, the contention on this subject was rather, that the judgments homologating the assessment rolls were prescribed by 10 years, from the date of homologation, and hence the defendant could not be held to account for them, but surely, the trustee having charge of an estate, could not be allowed to say, he has permitted the same to be lost because of not taking the necessary legal steps to preserve said estate, and then plead his own dereliction of duty in discharge of his liability to account. If such judgments were prescriptable by 10 years, which we deny, then it was the duty of the City to have instituted proceedings for their revival, which as a matter of excessive precaution she did so, and said proceedings are still pending.

Referring again to the question of prescription the city, in its brief, expressly disclaims the benefit of any prescription against its liability as a trustee of the assessments against private persons and property, but merely claims that the assessments against itself and as *quasi* owner of the streets and squares are prescribed. Counsel for petitioners say, at page 29 of their brief, "the city here does not plead prescription against her accountability as trustee of the drainage taxes due by private individuals; she claims the judgment against herself has been extinguished by prescription."

As the assessments against private persons amount, in round numbers, to $733,00, and those against the city to $700,000, exclusive of statutory interest due thereon, and either amount will be sufficient to pay the warrants involved in this suit, the prescription claim by the city is not material. The same may be said as to the question of the liability of the city for the assessments against it—whether they are paid or prescribed, if valid, it is not material, as the private assessments with interest thereon are sufficient to pay the warrants.

VI.

As to the contention of *res adjudicata* based on the decree in Peake vs. New Orleans, 139 U. S., p. 342:

The matters necessary to constitute *res adjudicata* are thus stated in Lyon vs. Perin Manufacturing Co., 125 U. S., page 700, as follows:

"It is well settled that in order to render a matter *res adjudicata* there must be a concurrence of the four conditions, viz.: (1) Identity of the thing sued for; (2) Identity of the cause of action; (3) Identity of the parties and persons to the action; (4) Identity of the quality in the persons for or against whom the suit is made."

In the case at bar neither the parties or the cause of action are the same as in the Peake case.

In the latter case, Peake was the original complainant, and afterwards there was an intervening bill by James Jackson, and the City was defendant, but at no time, and in no manner, was the complainant a party to that case.

It is true that bill was brought by Peake for himself and

others similarly situated who might intervene for their interest therein, but surely it would bind only those who did so intervene.

In the case of Calhoun vs. St. Louis and S. E. Ry. Co., 14 Fed. Rep., page 8, Judge Pardee said:

"The equity rules that allow suits to be brought by some complainants for the benefit of all, expressly reserve the rights of absent parties."

See also the case of Hook vs. Payne, 14 Wall., page 252, where the head note is as follows:

"1. In a suit in the Circuit Court of the United States by a distributee of the estate of a decedent to recover a distributive share, the mere fact that the administrator is ordered to account before a master does not make parties all who were entitled to distribution, nor authorize a decree in their favor.

"2. If such persons do not appear before the master, no decree can be made for or against them, because they are not to be bound thereby."

Nor is the cause of action the same. The Peake case was based on drainage warrants issued for drainage work done under Act 30 of 1871. This case is based on drainage warrants given to Van Norden for his drainage plant, pursuant to Act. 16 of 1876, and issued under a bill of sale containing express and implied warranties coming into existence long after said work warrants were issued.

It is contended that purchase warrants were the basis of the intervening bill of Jackson in the Peake case, but this we think is an error. Jackson's intervention was not based on warrants of any kind, but on a judgment of law,

recovered on warrants without any declaration whatever as to whether the basis of said judgment was work or purchase warrants, (R. pp. 358 to 363) while the bill in the Peake case shows the consideration of the judgment made the basis of the Peake spit were work warrants, as follows:

"And your orator further shows that he is the holder and owner of a certain judgment based on three of the above named warrants, issued under and in pursuance of the above Act No. 30 of 1871, for work and labor done by the said Mexican Gulf Ship Canal Company, and said W. Van Norden, trans feree thereof under the provisions of said act, and measured and accepted by said City of New Orleans, etc." (R. p. 150.)

The averment of Jackson is, (R. p. 358) that his warrants are similar to those described in the bill of complaint of Peake. In his intervening bill (R. p. 358) he says as follows:

"That since the year of 1879 he has been the holder and owner of eight drainage warrants issued to the City of New Orleans according to law and similar to those described in the bill of complaint of complainant, James W. Peake, the original plaintiff in this suit; that all said warrants are dated June 6, 1876, and are numbered from 322 to 329, both inclusive, and are each for the sum of $5,000, except No. 329, which is for the sum of $10,000, making in all an aggregate sum of $45,000.

"That your orator, on April, 1887, instituted suit on said warrants on the law side of this Honorable Court, and on December 3, 1887, recovered of the defendant, the City of

New Orleans, as provided by Act. No. 30 of 1871, as the successor of the drainage commissions, established under Acts No. 165 of 1858, and No. 191 of 1859, and the various acts amendatory thereof, the sum of forty-five thousand dollars ($45,000), with eight per cent interest from June 6, 1876, and costs of suit; that your orator issued a writ of *fieri facias* on said judgment on 30 December, 1887, and the same was returned by the marshal on 8 March, 1888, no property found after due demand, all of which will appear by the record of said suit, numbered 11,558 on the docket of this Honorable Court.

"Your orator is similarly situated with the complainant, James W. Peake, and desires to unite with him in the prosecution of his suit," etc.

It nowhere appeared in that case, either by the pleadings or proof, upon what kind of warrants Jackson's judgment was based, and, as the pleadings show, Peake's averred judgment was based on warrants given for "work and labor done" * * * under the provisions of Act 30 of 1871, and Jackson's pleadings declared the warrants on which his judgment was based were "similar to those described in the bill of complaint of James W. Peake, and on Jackson's averment that he was similarly situated with complainant, James W. Peake, it is clear the whole case was treated and decided as a case based on work warrants. Any difference between the two classes was, therefore, never before the Court.

It is true that the Circuit Court, in its opinion in that case, declared the purchase warrants were "in precisely the same catagory as the other drainage warrants issued for

work," but as we have before shown, this was a mistake and was a matter not embraced in the pleadings, and the Court's opinion can have no effect outside of said pleadings. As was said by Judge Wallace, in Oglesby vs. Attrill, 20 Fed. Rep., p. 570:

"What the Court said is valuable as a contribution of legal learning, but if the Court has given very poor reasons for its conclusions, the fact of the adjudication would have been the same."

But as before stated, this precise question of the city's liability to account for the drainage taxes existing at the time of the purchase from Van Norden, has already been decided and in this very case.

VII.

It is contended the court grossly erred in decreeing the city was the absolute debtor of the drainage warrants sued on, while all the bill sought to obtain was an accounting of the drainage taxes, and that in no event could said warrants sued upon, be considered the unconditional obligations of the city until it was shown all the taxes had been lost, misappropriated or misapplied, even if then, which is denied.

The latter can only relate to the assessments due by individuals, for which the city, by her conduct, and by warranties expressed and implied has made herself liable, but there are many answers to the entire contention, and among them are the following:

In the first place, the court has never decreed the city was the absolute debtor of the warrants sued upon. A

mere inspection of the decree (R. p. 550) shows the contrary. The city is decreed to be the debtor of the complainant Warner for $6,000 with interest, to be paid in principle and interest "out of the drainage assessments set forth in the bill filed herein," which assessments the decree declares "constitutes a trust fund in the hands of the City of New Orleans for the purpose of paying the claims of complainant and other holders of the same class of warrants," &c., and the matter is then referred to a master to take and state an account, and that upon the coming in of said account, complainant will then be entitled to an absolute decree against defendant for the amount due him if the fund established by said accounting shall be sufficient to pay all warrant holders of the same class, and if not he shall recover his pro rata. There is no absolute decree against the defendant to be paid in any event, but a decree to be paid out of a particular fund of which the city is the administrator, and to which it is decided she is the debtor.

Nor is it true that it has not been established that all of the drainage assessments against individuals have not been lost or misapplied. In the 18th paragraph of the bill (R. p. 12) it is alleged that ever since said purchase, the city has done nothing to compel the payment of the drainage assessments except keep an office open where the same might be voluntarily paid, that she has adopted ordinances, and pursuant thereto the mayor of the city, by public proclamation, advised the persons owing the said assessments not to pay the same, and has done other things there enumerated to destroy the drainage fund, and by reason there-

of, and by reason of not completing said system or adopting another and draining the land, the Supreme Court of Louisiana, in the 34 An., p. 170 decided said assessments could not be enforced or collected and that this decision has become the settled jurisprudence of the State, and that since the date thereof the assessments have little or no value. And by the 19th paragraph of said bill (R. p. 14) it is alleged said assessments have now (the date of filing said bill, November 26, 1894,) "become uninforcible and worthless to holders of drainage warrants given for the purchase of the aforesaid dredge boats, implements and franchise, which from the date of said purchase up to the present time, has not paid for in whole or in part in drainage taxes or otherwise provided any means for the payment of said warrants, or offered any restitution of said property."

The record is full of proof in support of the above allegations, but happily we are relieved from any reference thereto, for the defendant in his answer admits (R. p. 196) "that large amounts of drainage taxes have been cancelled and erased under this decision, and that it has become the settled jurisprudence of the State ,but this defendant denies that said taxes have been lost 'in consequence of the suggestion or proclamation' put forth by defendant, but that said erasures and cancellations have been solely because, under the decisions of the courts, the collection of the drainage taxes could not be enforced."

Nor is it true that the bill asked merely for an accounting of the drainage tax as an inspection of its prayer will show, but further asked that from the sum found due on

said accounting complainant and other parties similarly situated be paid to the full extent of their warrants with interest thereon.

VIII.

As to the 19 different errors assigned in the petition for a rehearing, filed in the Circuit Court of Appeals, and now made part of the errors herein assigned, we have simply this to say The same errors are substantially assigned in the petition herein, and hence are answered under the discussion of said assignment of errors in the brief herein set forth.

IX.

As to the alleged wrongful allowance of eight per cent interest on the warrants sued on, from the date of their issue, and es pecially as the act of sale did not provide said warrants should have interest.

A very slight examination of the statutes under which they were issued will show how utterly unfounded this contention is.

Act No. 16 of 1876 (Stat. p. 15) after providing the city might purchase in case she deemed it advisable so to do, upon an appraisement of the property to be purchased, further provided:

"That all amounts to be paid, when agreed upon, shall be paid in drainage warrants by the City of New Orleans, which said warrants shall be issued in the same form and manner as those heretofore issued to the transferee of said company, under act No. 30 of acts of 1871, for work done. They shall be made payable out of the drainage assess-

ments, and shall be issued as soon as any agreement shall have been completed."

What is the "form and manner" of warrant provided for under said act 30 of 1871?

The 8th section of said act, (Stat. p. 11) after providing that the work done during each month should be measured by the city surveyor and the cubic yards thereof certified by him, further provided:

"It shall be the duty of the Administrator of Accounts on the presentation to him of said certificate of the City Surveyor or Engineer appointed by the Board of Administrators, by the President of said Mississippi and Mexican Gulf Ship Canal Company, to draw a warrant or warrants on the Administrator of Finance, in payment of the work so done, at the rate of fifty (50) cents per cubic yard of excavating and fifty (50) cents per cubic yard for protection levee, and said warrants to be of such denomination as may be required by the President of said Company. These warrants it shall be the duty of the Administrator of Finance to pay on presentation to him, in case there be any funds in the city treasury to the credit of the said Mississippi and Mexican Gulf Ship Canal Company; but should there not be sufficient fund to cash the said warrant or warrants, then the Administrator of Finance is hereby required to endorse upon the same the date of presentation, after which date the said warrant or warrants shall bear interest at the rate of eight per cent per annum until paid, which condition shall be set forth in the form of the said warrant or warrants."

This manner and form and the condition in said sec-

tion provided for is fully set forth in th warrant sued upon, (R. p. 109) and the said presentation thereof to the Administrator of Finance por payment is proved by his endorsement thereon, from which date (June 6, 1876) as the decree complained of rightfully declares shall "bear interest at the rate of eight per cent per annum until paid."

It was, therefore, not necessary that the act of sale should declare what interest the warrants should bear, for this was provided for, by act 16 of 1876, in connection with section 8 of act 30 of 1871.

Without the provision for interest at eight per cent per annum the warrants to be issued would not be in the manner and form and would not contain the *condition* provided for in said act 30 of 1871.

But, independent of said statutes, it is the jurisprudence of Louisiana that all debts bear interest from the time they fall due, and these warrants fell due from the date of their presentation, June 6, 1876.

X.

As to the alleged unfairness and fraud in the contract of sale of June 7, 1876, under which the purchase warrants were issued.

A charge more unfounded in fact and worthless in law was never made, and it would seem that no one but a mere tyro in the profession would attempt to collaterally impeach a sale when he is asked to pay the price due thereunder, without, at least, sepcifying some act of fraud on the part of the vendor.

In all the numerous litigations that have been had in

this matter—the Cro.., cases (R. pp. 134 to 142), in the Peake cases (pp. 160 to 164), and numerous others—such an allegation was never made before the filing of the answer in this case on October 30, 1897, (R. p. 186) more than 21 years after the sale was made, and no suit has ever been brought to have said sale set aside for error, fraud or mistake.

It is true the sale of the dredge boats to Van Norden was made for $50,000, which was credited on an amount of $161,962.86, which the seller then owned himself, (R. p. 105) but the proof does not show, and it was not necessary in this case that it should show the amount of lien claims existing against said boats at the time, which he subsequently discharged.

And that said dredge boats were not in bad condition as alleged, but in a first-class condition at the time of sale, is shown by the evidence of Moody (R. p. 274), and by the report of the city's own appraiser, who not only reported them in good condition, but that their original cost was $205,000 from which he made a deduction of 25 per cent " for wear and tear from use and deterioration by age," and made their value $157,750.00. (R. pp. 91 to 97.)

But the dredge boats were not the only things the city bought and paid for. As she was authorized to do, by the act No. 16 of the legislature of the year 1876, having the value of the boats fixed as above, she bought from Van Norden and the Canal Company, not only said dredge boats but also the exclusive franchise granted under act 30 of 1871, and settled claims for damages against the city for a very large amount, and which he was entitled to for

delay, under the provisions ofa ct 30 of 1871, and the amount to be paid for all of the above (and not for the dredge boats alone as is alleged) was detirmined after the above appraisement and report of said city surveyor, by resolution of the Council of the City, at $300,000, which said resolution (R. p. 104) declared was:

"For the purchase of all dredge boats, derricks, parts of machinery and property of every description belonging to the Mississippi and Mexican Gulf Ship Canal Company, or its transferee, and used for the excavation of drainage canals or construction of protection levees, as per inventory of the city surveyor; also for the full settlement of all calims for damages and to secure the absolute sale, relinquishment and transfer to the City of New Orleans of all rights, privileges and franchises created, authorized or arising in favor of the Mississippi and Mexican Gulf Ship Canal Company, and transferee, under and by virtue of act 30 of 1871, or under and by virtue of all other acts of the legislature of the State of Louisiana or ordinances of the City of New Orleans, and embodying the terms agreed upon between W. Van Norden and the committee of the whole." (R. p. 94.)

We submit, the decree is clearly correct on the law and the facts of the case, and that the writ prayed for should be denied in the costs.

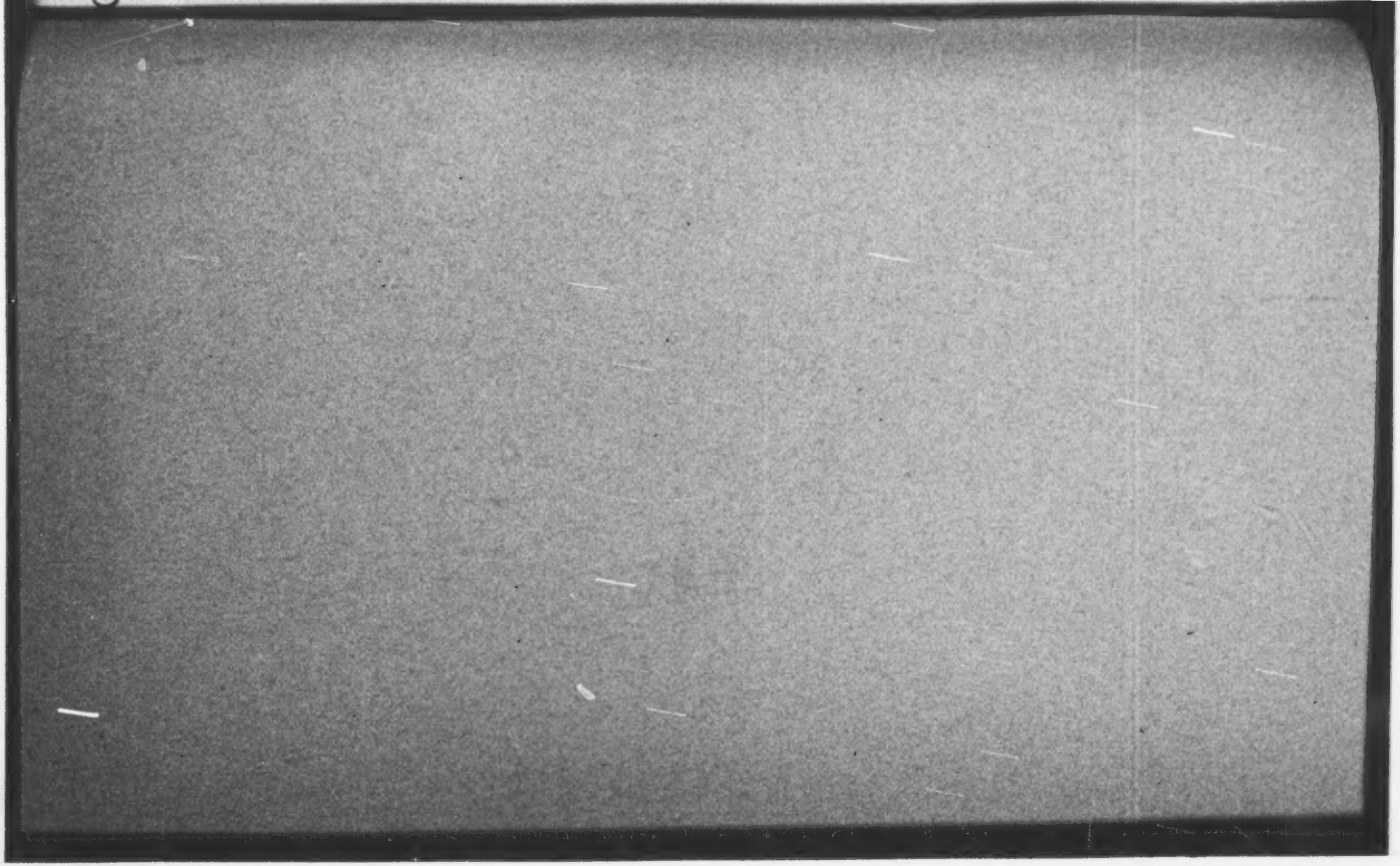
Respectfully submitted,

RICHARD DeGRAY,

JOHN D. ROUSE,

WILLIAM GRANT,

Solicitors for John G. Warner.



FILED
DEC 17 1898
JAMES H. McKENNEY,
Cl

No. 6442. 172

Brf. of Peckham for Respondent.

Supreme Court of the United States.

Filed Dec. 17, 1898.

THE CITY OF NEW ORLEANS,
Petitioner,

vs.

JOHN G. WARNER,
Respondent.

Additional Brief for Respondent.

Petition for certiorari to the Circuit Court of Appeals for the Fifth Circuit.

First.—If the views of this Court expressed in Amer. Constr. Co. *vs.* Jacksonville, Ry. Co., 148 U. S., 383, are to prevail in the disposition of this application then surely the prayer of the petition must be denied.

The case presents no question of public international law and no question as to rules or principles which guide the operations of a great class of people as navigators are guided by the rules of navigation.

I am of course aware that the rule stated in that case must have been somewhat relaxed because the succeeding volumes of the reports show that applications for the writ have been more frequently successful.

While however more writs have been issued no other principle seems to have been promulgated and it would seem to be a fair inference that litigation of an ordinary character and involving but ordinary questions should stop with the judgment of the Circuit Court of Appeals.

Second.—If tried by such test this application should be denied.

Not only is there no important question of law involved, but the learned counsel for the petitioner themselves in the opening remarks of their brief substantially say that there is none.

Addressing themselves to the supervisory power of this Court, they say that petitioner relies more upon the equities of its case than upon the *legal grounds* of attack against the decree of the Court below.

Has this Court extended the rule as to when the writ will issue so as to embrace a case where petitioner claims that the equities were wrongly decided. If it has, *can* any case in equity be excluded? The bare statement of such a claim would seem to be its refutation.

What again, can complainant mean by speaking of the hard and oppressive character of the contract on which complainant sues?

There is no cross bill to set aside the contract on any such or any grounds.

No such defense is pleaded in the answer.

Relief or defense must be founded on "allegata" quite as much as on "probata."

Will the writ run to remedy a wrong or to establish a defense *not* alleged?

There is in the answer an allegation that "the sale thereof" *i. e.* dredge boats, etc., "for the price stipulated as to such property was a fraud upon this defendant and its taxpayers," Record p. 199.

No act however is alleged—no collusion, no deception, nothing from, or because of which the inference of fraud could be drawn.

It is too well settled for discussion that neither in bill or answer can such an averment form the basis for the taking of testimony or for a decree.

Third.—Turning then to the minor errors complained of as errors of law.

The principal ground of complaint seems to be that the Court below ignored or overlooked or said nothing about the defense of *res adjudicata.*

But what better could the Court have done? Why should it not have been ignored? And why should the Court be taken to task for its tenderness to the petitioner in ignoring this defense?

Is any principle better established than that to be *res adjudicata* the matter must have been before adjudged in a controversy between the same parties or their privies?

Now, there is not in this answer a suggestion that the former judgment referred to was between these parties or their privies, but the contrary is affirmatively alleged.

The judgment referred to is alleged to be that of one Peake *vs.* City of New Orleans. Nothing is alleged in any way to connect the complainant herein therewith.

The case may or may not be a precedent or an authority in later controversies, but who before ever heard of pleading a precedent or an authority?

Could the Court do better for the petitioner than to cover the point with the mantle of oblivion?

Fourth.—Petitioner says that the Court below misconstrued the decision of this Court in this case in answer to the questions certified to it by the Circuit Court of Appeals and says on p. 3 of brief of counsel "that the superiority" which this Court "held to be enjoyed by the purchase warrants over those issued for work is found in the fact that the former were issued as the price of the sale of the property."

This Court held no such thing.

This Court held that the warrants issued to pay for a purchase made by the city itself pursuant to an act giving the city authority to purchase or not, as it in its discretion should determine were not affected by the bonds issued by the city while warrants issued under acts which required the city to issue them and gave it no discretion, were affected by the bonds issued by the city (Record, p. 588. quoting opinion of this Court in this case, 167 U. S.). Neither petition nor brief of counsel nor the record shows that the Court below construed the decision of this Court as deciding anything else.

Fifth.—The opinion below, after reciting all the defenses pleaded in the answer, including that of *res adjudicata*, says, page 590, that as to *nearly* all of them they might rest their decision on *the opinion* of this Court in answer to the certified question, and then goes on to discuss and pass upon all the defenses except that of *res adjudicata*, which apparently it rightly deems needs no discussion.

It does say that all the facts averred in the bill have either been "admitted by the answer or abundantly established by the evidence."

Can it be that this Court deems that the minute examination of evidence in order to determine a question of fact not seriously disputed presents a case proper for a writ of *certiorari?*

Sixth.—The Court held that the city as to these warrants was a trustee by her voluntary contract. The demurrer of course admitted the allegations that the city had violated its duty by omitting and preventing collections, etc., etc.

The Court below says on answer and proofs that the city has so violated its duty and refers to the judgment of the State Court in Davidson *vs.* New Orleans, 34 La. Am., 170, as having also so adjudged. Record, p. 591.

Is it a case for *certiorari* on a question of fact when it has been decided the same way by both State and Federal Courts?

Seventh.—Petitioners claim the benefit of several statutes of limitation—but when was it ever suggested that a statute of limitations ran as between trustee and *cestui que trust* the trustee not repudiating, but alleging as the City of New Orleans does in its answer that it has performed and still is performing its trust? Could any thing more *inequitable* be imagined?

Eighth.—That the mere fact that the litigation may involve a considerable sum is no reason, for a certiorari goes without saying. The amount *directly* involved is six thousand dollars and interest. Holders of other similar warrants may come in under the decree and prove them, thus raising the amount indirectly involved, including interest, to say eight hundred thousand dollars.

In these days of litigation as to large interests involving many millions of dollars, surely the amount at issue in this suit cannot call for a certiorari.

Ninth.—The fact that the city is charged as assessee for streets and squares is no ground for the writ.

That public property benefited should pay for the benefits like any other beneficiary is surely just and honest.

Such benefits should be paid for by the public represented by the municipality.

That has been done in this case—nothing more—and the doctrine is too familiar and too emphatically just to warrant the issue of a writ in order to dispute it.

Tenth.—The alleged error in making the city personally responsible does not exist. An account is ordered and the city is to be charged with the assessments collected, or which should have been collected, and which the city negligently omitted to collect.

The city is charged with nothing more, and is to be credited with all that it has paid out, except the bonds which this Court has said that the city is estopped to plead.

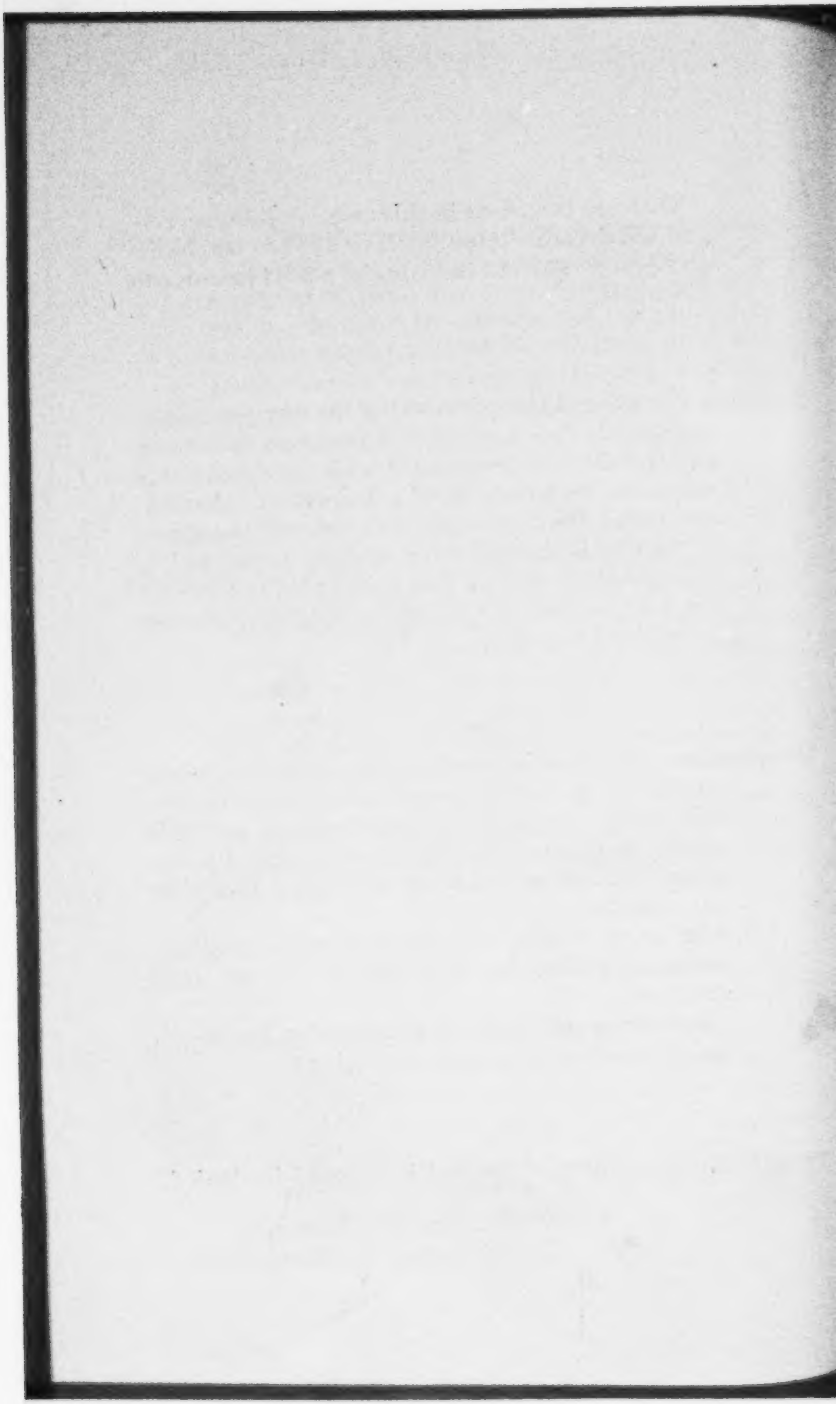
Eleventh.—The last alleged error is the most comical of all. That the constitutional clause limiting debt and which in terms excepts drainage warrants should be claimed to apply, because the city has committed a breach of trust by failing to collect assessments.

In other words, the city has squandered the assets and claims that it should not be accountable.

Is it supposed that the constitution has legalized a breach of trust and conversion?

Twelfth.—The prayer of the petition should be denied.

WHEELER H. PECKHAM,
Of Counsel for Respondent.



No. 640. 172

Brf. of Peckham for Resp't. Con

JAN 30 1899
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

Filed Jan. 30, 1899

THE CITY OF NEW ORLEANS,
Petitioner,

against

JOHN G. WARNER,
Respondent.

No. 640, Oct. Term, 1898.

This is a motion to advance this cause for a hearing.

The motion is made by the respondent, John G. Warner, to a petition by the City of New Orleans for a writ of certiorari to the United States Circuit Court of Appeals, which petition was granted.

The petitioner, the City of New Orleans, joins in the request for advancement.

POINTS.

First.—This case has so recently been before the Court on motion to dismiss appeal, which was granted—on motion for certiorari which was granted, and earlier on certificate of certain questions raised by demurrer, reported 167 U. S., 467, that I may assume that the Court is sufficiently familiar with it to dispense with any further statement.

Second.—The cause is entitled to be advanced under Sub. 4 of Rule 26.

The former hearing was on a demurrer for want of equity and the question certified to this Court was on the merits and the adjudication was on the merits.

The adjudication was that the city of New Or- Orleans is estopped to set up the issue by the city of certain bonds as a defence herein.

That there may be some other questions involved is no reason why the case should not be advanced—but the contrary.

Presumptively *second* appeals or writs of error involve new or additional questions or they would not be brought.

Third.—True, this case is not "again brought up by *writ of error or appeal.*"

The rule is, I believe, older than the statutes organizing the Circuit Courts of Appeals and allowing writs of certiorari.

The function of the certiorari is, however, the same as that of a writ of error or appeal. It brings the case here for adjudication or decision.

Fourth.—It would be of the greatest moment to the parties to this cause if the Court could decide this motion before the vacation, and if granted, assign a day for the hearing so that the parties may be ready on the reassembling of the Court on the day assigned.

WHEELER H. PECKHAM,
Of Counsel for the Original Plaintiff.

SUPREME COURT OF THE UNITED STATES.

October Term, 1898.

No. 640.

CITY OF NEW ORLEANS, APPELLANT,

versus

JOHN G. WARNER, APPELLEE.

ON CERTIORARI.

STATEMENT OF THE CASE.

By an act of the Legislature of Louisiana, approved March 18, 1858, provision was made for reclaiming and draining certain portions of the city of New Orleans. For this purpose three districts were established, and the work was to be accomplished through the instrumentality of boards of commissioners, who were authorized to levy special assessments on each superficial square foot of the lands within the several districts, to defray the cost of the improvement. These assessments, when made, were to become and remain a lien on the lands until paid (Statutes, pp. 1 to 6). By a later act, approved March 1, 1861, the commissioners were authorized to reduce the assessments to judgment against the property itself, and the owners thereof, upon which execution might issue in the ordinary mode (Statutes, pp. 8 and 9). Assessments

were thereafter made upon the regular rolls, pursuant to law, which included the city of New Orleans as owner of the streets, squares and public places, as well as the owners of private property; and these assessments were reduced to judgment, in the statutory mode, against the city and private owners (R., pp. 110 to 112, pp. 21 to 46, 46 to 58, 58 to 70, 70 to 84, 84 to 91). The boards of commissioners continued to act until 1871, when, by Act No. 30 of that year, the Legislature (Statutes, pp. 9 to 13) subrogated the Board of Administrators of the city of New Orleans to all the powers, and transferred to them the assessment rolls, which the act declared "are hereby confirmed and made eligible," and the city was directed to collect the taxes and place the same to the credit of the Canal Company. By Sec. 1 of this act the Mexican Gulf Ship Canal Company was designated to do the drainage work; and by Sec. 2 the company was specially authorized to dig a canal, and with the earth excavated to build a protection levee around the city, the location whereof to be designated and fixed by the city. By the third section, the company was authorized to dig such other canals as the city might designate. By the eighth section, it was provided that the work should be examined by the City Surveyor, and upon his certificate of the amount of work done, be paid for by an order drawn by the Administrator of Accounts against the Administrator of Finance, payable on presentation, "in case there be any funds in the City Treasury to the credit of the Mexican Gulf Ship Canal Company; but should there not be sufficient funds to cash said warrant or warrants, then the Administrator of Finance is required to endorse upon the same the date of presentation, after which date the said warrant or warrants shall bear interest at the rate of 8 per cent. per annum until paid, which condition shall be set forth in the form of said warrants."

In 1876 the Legislature by Act No. 16 of that year

(Statutes, pp. 15 to 17) authorized the city to contract for the purchase from the Canal Company, and its transferee, all their "rights, franchises and privileges authorized, created or arising under or by virtue of Act 30 of Acts of 1871, also for the purchase and transfer to the city of New Orleans of all tools, implements, machines, boats and apparatus belonging to said company, and its transferee."

By the second section it was provided that the value of the rights and things purchased should be fixed by appraisers appointed by the city; and by Sec. 3, the price was to be paid in drainage warrants, "in the same form and manner as those heretofore issued to the transferee of said company, under Act No. 30 of 1871 for work done."

Sec. 4 provided that after the purchase the city should alone have the power to do all the drainage work itself.

The franchise and property of Warner Van Norden, transferee of the Canal Company, were appraised by the city (R., pp. 91 to 97 and 104), and the city issued drainage warrants for the price, in the same *form and manner* as those theretofore issued for work done, as prescribed by the act of 1871. In the act of sale and purchase the city expressly stipulated "not to obstruct, but on the contrary to facilitate by all lawful means the collection of drainage assessments as provided by law until said warrants have been fully paid," etc. (R., p. 102).

The bill in this case was filed on the 26th day of November, 1894, by complainant as holder of $6000 of the purchase warrants, in behalf of himself and all other holders similarly situated. The bill avers that the city has collected a considerable amount of the drainage assessments, and would have collected more but for its acts of obstruction and neglect of duty in violation of its contract; that the city would set up as a defence that it had discharged its liability to the drainage fund by the issue of bonds to take up warrants given for work done prior to said purchase, in excess of the whole amount of the as-

sessments, if it ever was liable therefor; and would, in this respect, rely on the decision in the case of James W. Peake versus New Orleans, 139 U. S. 342 (R., pp. 1 to 19).

The defendant demurred to the bill (R., p. 166), which was sustained by the Circuit Court, on the authority of that case (R., p. 169). Upon appeal the Circuit Court of Appeals certified the question to this court, whether defendant was estopped by its covenants to plead the issue of said bonds as a discharge of its liability to the holders of the purchased warrants (R., pp. 174 to 179). This Court answered the question in the affirmative (see Warner vs. New Orleans, 167 U. S. 467) and the Court of Appeals thereupon reversed the decree on the demurrer (R., p. 180).

The defendant then filed an answer, alleging in substance that it had at all times, up to the date the bill was filed, continually used every effort to collect the drainage assessment against private persons, admitting that it had collected over $300,000 of drainage taxes from 1871 up to June 20, 1891), and tendering an account of the collections and their expenditure. As an excuse for not collecting more, the answer avers that the drainage plans were so defective that the work could not be completed with any benefit to the property assessed, and that the Supreme Court of the State for this reason has decided that the consideration for the assessments had failed, which has rendered further collections impossible. The defendant then denied that the city is itself liable for the assessments on the streets, etc., and again pleaded the issue of the bonds as a discharge of its liability. The answer concludes with a plea of the prescription of five years against the warrants, and ten years against all personal actions, for an accounting of the trust fund (R., pp. 186 to 203).

The Circuit Court dismissed the bill after a trial on the merits, but without making any finding or giving any

written opinion (R., p. 544). Upon appeal by complainant the Court of Appeals reversed that decision and gave decree in favor of complainant (R., p. 550). It is this decree which is now sought to be reviewed on the writ of certiorari. The petition upon which the writ was granted does not contain any very clear or precise statement of the errors upon which the city relies, and we are therefore compelled to take up the salient points, without much regard to orderly arrangement.

ARGUMENT.

I.

One complaint is that the Court of Appeals erred in holding that the alleged defects in the drainage plan were attributable to the city. But this is not supported by the record. What the court did find was that though the general plan under which the work was undertaken was prescribed by the Legislature in the Act of 1871, it was subject, however, to the power of the city to fix the location and prescribe the number of the interior canals; and that, as a matter of fact, the city, through its ordinances, based on the recommendation of its engineer, actually located each canal that was excavated by the Canal Company, and that its own officers supervised the work. The court further found that the principal objection made to the plan by some of the engineers was that it did not provide a sufficient number of interior canals to meet the future requirements of a growing city, but that this defect, if it existed, was chargeable to the city and not to the constructors, and the record shows that these findings of the court are correct, for the city, on April 27, 1871, passed Ordinance No. 814 (R., p. 244), placing the matter of locating the levees and canals in the hands of the Mayor and Administrator of Finance, and declaring that the city would not pay for any work unless it should be authorized

by this committee. Other ordinances of a similar character were subsequently adopted.

May 20, 1870, the city, by Ordinance No. 820 (R., p. 246), authorized the extensive work therein specified, to be done in accordance with Ordinanee 814.

July 19, 1871, the drainage committee submitted a plan of the work to be done (R., p. 258). February 16, 1872, the city by Ordinance 1362 (R., p. 259), authorized other extensive work to be done, but reserving the right to stop any portion of the work at any point of its progress.

August 4, 1875, Ordinance 3209 (R., p. 319) was adopted authorizing the Canal Company to dig the Nashville Avenue Canal to be located by the City Surveyor. Other works were authorized by like ordinances unnecessary to enumerate. Not only do these ordinances show that the city directed with great particularity what work should be done, but W. H. Bell, City Surveyor at that time, who was asked "who planned the work under that act" (Act 30 of 1871), says: "I was City Surveyor and drew the plan for the work with the approval of the City Council. It was submitted to the council and approved by them—the different lines and maps" (R., p. 220). A copy of this plan or map showing the amount of work done thereunder is in evidence and bears the name of "W. H. Bell, City Surveyor."

The weight of the evidence is that if the plans of the city had been carried out as devised by Bell it would have accomplished the drainage of the city. *See* depositions of W. H. Bell (R., p. 221), Fremeaux, his assistant (R., p. 285); Collins, Administrator of Improvements (R., p. 224); A. C. Bell, present City Surveyor (R., p. 307), and Palmer (R., pp. 294, 295).

If the complaint of the city that the plan was defective in not providing a sufficient number of interior canals, as testified to by Engineer Brown (R., p. 451), and Harrod (R., p. 467) is well founded, it was clearly its own fault,

and not that of the contractor, who could do nothing without its consent.

In the face of this evidence, counsel for the city, as the Court of Appeals says in its opinion, frankly abandoned at the argument all pretence that the defects in the plan, if any existed, were chargeable to the Canal Company or its transferee.

As to the character of the work which the answer charges was defective and bad, H. C. Brown, assistant surveyor of the city, who had immediate supervision of the work, called as a witness for the defendant, being asked whether the work was well done, says: "It was well done; there is no question about that—never has been, I think" (R., p. 458). As he was the officer of the city charged with the duty of certifying the work for payment, his evidence is conclusive on this point, especially as he is the only witness who has testified on the point.

The Court of Appeals having found that the drainage work was done under plans furnished by the city itself, further found, that these plans, if they had been carried out, which could have been accomplished at the expense of about $500,000 (R., pp. 590 and 456 to 459), would have sufficiently drained the city to have earned the assessments and make them available for the payment of the purchase warrants: but that the consideration of the assessments failed, and they became uncollectible, because the city failed to complete the work, as the Supreme Court of Louisiana has adjudged in the case of Davidson vs. New Orleans, 34 La. An. 170.

The Court further found from the evidence of Harrod and Brown, that the city has recently adopted a plan devised by them for the drainage of the city in which all this old work is utilized, which is estimated to cost over $8,000,000 (R., pp. 591 and 481). The only difference between the new plan and the old one devised by Bell, is the provision made for additional interior canals, with

more pumping stations and with an outlet into Bayou Bienvenu.

In view of all these facts, did the Court of Appeals err in holding that by not completing the old plan of Bell, the city had failed to do what "was reasonable and fair" to make the assessments—— ,the fund good, out of which these purchase warrants were to be paid? Not only did the city neglect to complete the work which it might have done by a comparatively small expenditure of money, but it notified the taxpayers not to pay the assessments until their liability should be determined by the Supreme Court, referring to the case of Davidson vs. New Orleans, 34 An. 170, a decision which subsequently afforded all unwilling taxpayers an excuse to repudiate their liability, on the ground that the city had not completed, and was not likely to complete, the drainage system.

The defects in the plans of the city and its neglect to amend them, and devise and complete a proper system, was no doubt a sufficient excuse to the private property holders for refusing to pay their assessments; but we fail to see upon what principle the city can set up these faults, to avoid the assessments against itself, or to escape liability for the assessments against private persons, lost by the same faults and omissions. The city, as we will show, in another part of this brief, having acquired the property of Van Norden on the faith of the validity of the assessments, and having warranted their existence by drawing warrants against them for the payment of the purchase price of the property, should not now be permitted to avoid liability on account of the alleged vices in the plans, even if they were not its own.

Under all these circumstances, the Court was clearly right in applying the maxim that, "Equity looks upon that as done, which ought to have been done," and charging the city with the amount of all assessments as money collected and in hand for the payment of the warrants.

II.

Another complaint is that the Court of Appeals erred in charging the city with liability for assessments against itself, on the area of the streets, squares and public places, as *quasi*-owner.

These assessments were levied under authority of Act No. 165 of 1858, creating the drainage districts, to be found *in extenso* in the printed pamphlet of the acts of the Legislature filed with the record.

The Boards of Commissioners, by Sec. 7, were required, whenever they were prepared to drain their respective districts, to make a preliminary plan designating the section to be drained and describing the property therein, with the names of the owners, and to deposit it in the mortgage office, and give notice thereof in a newspaper published in the city of New Orleans. They were then authorized to apply to one of the District Courts of the parish for the approval of the plan, which Court the statute declared—

> "Shall decree that each portion of property situated in said limits is subject to a first mortgage, lien and privilege in favor of such Board of Commissioners for such amount as may be assessed upon the property for its proportion of the cost of draining such section."

Sec. 8 provided:

> "That said Boards of Commissioners, each within its own section or district, shall have the right and are hereby authorized and empowered to levy such uniform assessments upon the superficial or square foot of land situated wiihin the drainage section or district of such board to defray the construction of the levees, machinery, canals and other works necessary for the purpose of carrying out the provisions of this act."

This act was amended in 1861 by Act No. 57, which provided a mode for reducing the assessments to judg-

ment, authorizing the court named therein to approve and homologate said assessment rolls, "which shall be judgments against the property assessed and the owners thereof, on which execution may issue as on judgments rendered in the ordinary way."

The preliminary descriptive plan in the several districts was approved by the Court upon the petition of the Board of Commissioners.

In the First District, August 24, 1861 (Exhibit A. R., p. 22).

In the Second District, March 15, 1869 (Exhibit B. R., p. 47).

In the Third District, the descriptive plan was made by Surveyor Bell, under the authority of the city, as successor to the Boards of Commissioners, pursuant to Act 30 of 1871, and approved by the Court upon the petition of the city, May 4, 1872 (Exhibit D. R., p. 70-1).

Subsequent to these preliminary proceedings, assessments were made by the commissioners of the districts, and judgments based on these plans were rendered in their favor for the same against the city and private property holders.

Later the city of New Orleans itself levied assessments in the several districts, based on the same plan, in its capacity as successor to the old board under Act 30 of 1871, and presented petitions to the proper court praying for judgment thereon against the property holders, including itself, for the amounts due.

From a judgment denying the prayer of this petition of the city to homologate the assessment rolls in the First District, the city took an appeal to the Supreme Court (R., pp. 27-8). That court upon its appeal reversed the judgment (see In the Matter of the Commissioners of the First Drainage District, 27 La. An. 20). The Court below then approved the assessment and gave judgment

for the amount against the property holders, including the city (R., p. 28).

All the assessments made prior to the date of Act 30 of 1871 were approved and confirmed by the ninth section of the act, which included the city of New Orleans as assessee of the streets and other public places.

All this is set out in the bill of complaint and appears in authentic form from the exhibits filed therewith, copied into the record between pages 21 and 90; and the answer of the defendant (R., p. 189) admits the averments of the bill with reference to the foregoing proceedings to be true, but alleges, in avoidance of the liability of the city, the nullity of the assessments and judgments.

The first ground of nullity alleged is that the streets, squares and public places are public things, and as such were exempt from taxation at the time these assessments against the city were levied. But, admitting that they are public things, we find nothing in the Constitution or laws of the State, and none is referred to by appellant, exempting them even from taxation, much less from special assessments for a local improvement. The most that can be claimed is that they are, owing to their character, not generally presumed to fall within the class of property intended to be taxed. It is, at most, a question of presumption, and not of the power of the Legislature to impose taxes upon such property. But the levy of local assessments for the improvement of property benefited thereby, is not, according to the weight of authority, considered as taxation in the sense in which that term is generally used.

This distinction has been uniformly recognized by the courts of the State of Louisiana. Says the Supreme Court of that State in Charnock vs. Levee Co., 38 La. Annual, 326.

> "In the course of time the matter has been considered over and over again in our courts, and in the

courts of sister States; and by an inveterate course of decisions, with rare exception, it has ripened into a settled principle of constitutional construction, that local assessments, or contributions, provided for the purpose of constructing public works for the advantage of particular districts, and levied upon property benefited thereby, and with reference to such benefits, are not considered as t`xes, within the meaning of constitutional restrictions on the power of taxation."

Board of Levee Commissioners vs. Lorio Bros., 33 La. Annual, 276.

Railroad vs. Board of Health, 36 La. Annual, 666.

Burroughs on Taxation, Chap. 22.

Cooley on Taxation, Chap. 20.

The same Court again reviewed the qnestion in Barber Asphalt Co. vs. Gogreve, 41 La. Annual, 263, citing the Drainage case in 11 La. An. 371, which arose under the drainage act of 1835, which is in all respects similar to the acts involved here.

But it is said that admitting the rule in regard to taxation does not apply to local assessments, still, as the act of 1855 did not expressly include public places, it ought to be held to exclude them by construction.

The conclusive answer to this contention is that the Legislature, with unlimited power to select the property chargeable with the cost of drainage, expressly directed that each superficial square foot within the several districts should be assessed therefor, without any words of exclusion or exemption.

As the act of 1858 is a substantial re-enactment of the act of 1835, amended in 1839, a copy of which is printed in the Drainage Case (11 La. An., p. 342), it may be assumed that the Legislature enacted it with the full knowledge and understanding that it would receive the same construction which had been given the original in that case two years before--*i. e.*, that the city was liable

for drainage assessments on the streets and other public places, although neither the city nor the public places were expressly included in the statute.

This construction has been accepted and followed in Louisiana ever since without qualification.

Marqueze vs. New Orleans, 13 La. An. 319.

Correjolles vs. Succession of Foucher, 26 La. An. 362.

Asphalt Paving Co. vs. Gogreve, 41 La. An. 259.

And the precise question has been decided in conformity with these cases in County of McLean vs. City of Bloomington (106 Ill. 209), in which the Court holds that a statute authorizing the assessment of property within a certain district for a local improvement includes the property of a municipal corporation therein *ex vi termini*, in the absence of express words of exclusion.

Moreover, the Boards of Drainage Commissioners in assessing the city, and the Legislature in approving the assessments in the act of 1871, gave this construction to the law; and the city, by assessing the streets to itself, and obtaining judgment against itself for the amount of the assessments, published to the world that it adopted such construction.

It admitted in the most solemn form that the law imposed upon it a liability for a part of the cost of this local improvement. Having, as it did, unlimited power to contract for the improvement of the public streets and squares under its charter, it could consent to be charged with a part of the cost of the work without the authority of a special statute.

The city was under no compulsion to submit to the judgment rendered in favor of the commissioners, nor to assess itself. It might have appealed from all the judgments, and did appeal from one of them, refusing to confirm one of the assessments, and procured a decree of the Supreme Court of the State affirming such assessment, which included itself as assessee of the streets and

public places. It might have refused to assess itself but did not. And now, having since contracted obligations payable out of these very assessments, it seems to us that common honesty forbids the city to deny its liability.

III.

Another complaint is that the Court of Appeals erred in holding that the city was estopped from disputing the validity of the assessments and judgments against itself, on the same principle that it was estopped from pleading the issue of bonds as a discharge from liability, as adjudged by this Court in Warner vs. New Orleans, 167 U. S. 467.

This involves the question whether the city, in purchasing the drainage property and franchise of the Canal Company, and its transferee, did not warrant the existence and validity of the assessments and judgments against itself; also, whether it is not estopped by its conduct to deny their legality.

The purchase price was paid by warrants drawn against and payable out of the drainage fund, composed partly of these very assessments and judgments. Whatever difference of opinion may exist among jurists as to the effect of an order drawn against a general credit, all the authorities hold that an order drawn against a particular fund, out of which it is payable, amounts to an equitable assignment thereof in favor of the payee.

Citizens Bank vs. First National Bank, L. R. 6; House of Lords, 352; English R. 7; Moak, 36.

In Gordon & Gomilla vs. Muchler, 34 La. An. 605, this point was expressly decided, and the supposed distinction between the civil and common law on the subject explained. And the Court held that even a written order by a creditor addressed to his debtor, and notified to him, payable out of a general fund, operates as a complete

legal assignment of the credit or incorporeal right referred to in the order, under Arts. 2642 and 2654 of the Civil Code.

To the same effect is the decision of Mr. Justice Miller in Bank vs. Coates, 12 Reporter, 514.

The obligation assumed by one who draws such an order is fixed by the Civil Code of Louisiana, under the title relating to the "assignment or transfer of civil credits and other incorporeal rights."

Art. 2646 says:

> "He who sells a credit or incorporeal right warrants its existence at the time of the transfer, although no warranty be mentioned in the deed."

This provision has been applied to all kinds of incorporeal rights, and especially to the transfer of judgments (Toler vs. Swayze et al., 2 La. An. 880; Corcoran vs. Riddle, 7 La. An. 268; Jenkins vs. Parish of Caddo, 7 La. An. 559; Johnson & Co. vs. Boi & Frelsen, 4 La. An. 273).

Even in case of a stipulation of no warranty the seller is liable to restore the price (Civil Code, Art. 2505).

And the principle established by the above Art. 2646 has been applied by the courts of Louisiana to all manner of contracts.

Thus in the case of Constance Semel, Tutrix, vs. J. M. Gould et al., 12 La. An. 225, it appears that the parish of Pointe Coupée made a contract with the plaintiff for the building of a levee upon certain specified land, in which it was stipulated that the plaintiff should look for payment exclusively to the lien given by the law on the land for the cost of the work. But it turned out, after the work had been done, that the land belonged to the United States and was not liable. The contractor thereupon sued the parish and recovered judgment, in affirming which the Supreme Court said:

"In making the contract for building the levee there was an implied warranty on the part of the Police Jury that the land on which the work was to be done belonged to a person whose property could be reached by their ordinances to defray the expenses of the work."

See also Tourniey vs. Municipality No. 1, 5 La. An. 298; Cronan vs. Same, 5 La. An. 537. To the same effect is the late case of Cole vs. Shreveport, 40 La. An. 841. The plaintiff in this case was to be paid for the cost of paving out of special assessments to be levied on propperty along the line of improvement, one-third by the municipality and two-thirds by the property owners. But this source of payment having subsequently failed on account of an illegality in the assessments, the Court condemned the municipality to pay the whole costs of the work, in this respect affirming the decisions we have quoted and referring to the decision of this Court in Hitchcock vs. Galveston, 96 U. S. 341, as conclusive on the question.

The same principle was recognized and applied in this Court, in District of Columbia vs. Lyon, 161 U. S. 200, where the district was held liable to a contractor for the cost of a local improvement, because it had neglected to levy a legal tax for its payment.

Another case directly in point is that of Meyer vs. Richard, 163 U. S. 385, in which Mr. Justice White, in a most exhaustive and learned opinion, reviews the principles of the civil law governing warranties of this character, in which he shows that this principle of warranty is of universal application under that system.

This bring us to the question of the binding effect of the judgments as a matter of strict law independent of all questions of express or equitable estoppel.

Ordinarily no one would have the assurance to deny the conclusiveness of a final judgment regularly rendered by

a court of competent jurisdiction in a proceeding to which the defendant was a party. Is the rule different in cases of judgments based on the assessment of a special tax? We think not. Freeman on Judgments, Sec. 135, places judgments for taxes upon the same general footing as other judgments in ordinary cases, and states, upon abundant authority, that they can not be impeached collaterally.

Passing directly on the question in Driggins vs. Cassady, 71 Ala. 533, the Supreme Court says:

> "While great accuracy is exacted in all such proceeding, and strict rules are applied for the protection of the taxpayer, the principle forbidding the collateral assailment of judgments had often been invoked in actions of this character."

Burrough on Taxation, 285.
Willshear vs. Kelly, 69 Mo. 343.
Eithel vs. Fort, 39 Cal. 439.
Cadmus vs. Jackson, 52 Pa. State, 295.
In Mayo vs. Foley, 40 Cal. 281, the Court says:

> "That while an owner of property which has been sold to pay a void tax by an executive officer may dispute the sale on that ground, he can not do so where the sale is made by a court in executiou of a judgment duly obtained."

This principle was clearly recognized by the Supreme Court of Louisiana in the suit of Davidson vs. New Orleans, 34 An. 170, which was a direct action brought by the plaintiff in the proper State court to have the drainage judgment against her set aside. While admitting that the judgment could not be attacked collaterally, the Court found that the plaintiff had a right to sue for its nullity on account of the subsequent failure of consideration resulting from non-completion of drainage.

In Louisiana not only are all judgments binding as adjudications, but parties are also estopped to deny the

truth of the allegations made in them. Says the Court, in Folger vs. Palmer, 35 La. An. 744;

> "Our jurisprudence has uniformly recognized and enforced the wise and salutary doctrine which firmly binds a party to his judicial declarations and forbids him from subsequently contradicting his statements thus made."

See also Farrar vs. Stracy, 2 La. An. 211; Dickson vs. Dickson et al., 33 Annual, 1370.

The same doctrine has been applied to the State itself (State vs. Taylor, 28 La. An. 460; State vs. Ober, 34 An. 360).

The Court of Appeals might have rested its decision on those strict legal estoppels, but it surely committed no error in applying to the transaction the same equitable estoppel recognized by your Honors in *Warner vs. New Orleans.*

V.

Another complaint is that the Court of Appeals erred in not holding that the issue of bonds by the city as a full discharge of its liability to the drainage fund, notwithstanding the decision to the contrary in *Warner vs. New Orleans.*

This contention is predicated on the theory that that decision was based on the state of facts then admitted by the demurrer, because it then appeared from the bill that Van Norden sold his property to the city without any notion that the city would claim it had been discharged by the issue of bonds, but that it now appears on issue joined that he had previously received those bonds in exchange for work warrants, and is therefore chargeable with knowledge of the consequences, and that he knew, from this fact, that the city would set up said discharge as a defence to the purchase warrants (R., p. 198). Actual notice and knowledge is not charged or proved.

On the contrary, Van Norden testifies that he had no such notice or knowledge when he made the sale, and would not have parted with his property had he suspected that any such inequitable claim would be made (R., p. 247).

The only notice he did have in regard to the bonds was contained in Sec. 13 of Act 73 of 1872, which provided that the drainage taxes should be first applied to the payment of warrants, and only the surplus to redeem the bonds, which directly negatived any idea that the issue of bonds should extinguish the drainage fund (Statutes, p. 13).

If the city intended at the time it made the purchase to avoid payment of the price on the ground that the fund out of which the warrants were made payable had no existence, and did not notify Van Norden of its purpose, it was guilty of obtaining the property under a false pretence. And if Van Norden parted with his property with this knowledge he was nothing less than an idiot, who ought to be protected by a court of equity. Courts do not indulge in such presumptions for the purpose of defeating contracts lawfully entered into upon a valuable consideration.

VI.

Another complaint is that the Court of Appeals erred in not deciding and sustaining the plea of *res adjudicata*, based on the decision of this Court in Peake vs. New Orleans (139 U. S. 323).

This so-called plea is embodied in the answer to the bill (R., p. 201), but it does not set out any part of the record or decree, showing what the Court decided, or who were parties, as is required by the rules of pleading. Nor is it averred by the answer or shown by the evidence that Warner was a party or privy thereto. Moreover, that suit was based on work warrants, which your Honors have distinguished from the purchase warrants in this case, as governed by a different rule of law. What better could the Court do than ignore such a plea?

VII.

Another complaint is that the Court of Appeals erred in not holding that the city had a right to abandon the drainage work without incurring any liability to holders of purchase warrants, as decided in Peake vs. New Orleans in relation to work warrants.

It ought to be a sufficient answer to this contention to say that the right to abandon the work and thus destroy the fund is not pleaded as a defence to the bill. On the contrary, the defence set up in the answer is based on the theory that the city has performed all its obligations by executing the stipulation of the contract of purchase, and the answer is stuffed with averments from beginning to end that the city has at all times made the most diligent effort to complete the work and collect the assessments, but has failed to do so on account of defects in the drainage plan for which the canal company and its transferee are alone responsible—an excuse, as we have shown, utterly untrue. The city did not dare to plead abandonment as a defence, in the face of your Honors' decision in Warner vs. New Orleans, that it was under a duty to make the drainage fund good and available for the payment of these purchase warrants.

VIII.

Another complaint is that the Court of Appeals erred in not holding that the Acts Nos. 48 and 67 of 1877, and Sec. 40 of Act 20 of 1882, authorized the city to abandon he work, and were a full defence in this suit.

But no such defence was made in the answer. On the contrary, it asserts, in response to the twenty-fourth clause of the bill averring that said laws are unconstitutional, because they attempted to impair the obligation of complainant's contract, that the city never used such laws—

> "As a pretence to cease or omit in any degree the effort to drain said lands and to collect said drainage

taxes, * * * but the facts are that after, as before the said acts, defendant's efforts to effect the drainage of said lands and collect the taxes were persistent and continued, * * * and that the fact had not the least influence to diminish, nor did it diminish in any degree, the efforts of this defendant to drain said lands or collect the said taxes" (R., p. 196).

Moreover, these facts, if pleaded, would have afforded no defence, as the Supreme Court of the State has held them to be unconstitutional and void as against these very warrants, in the case of New Orleans Canal and Banking Company vs. Van Norden, 30 An. 1371. Besides this, such a plea, if made, would have been inconsistent with the theory of the defence, set up in the answer, that the city had disregarded them.

IX.

The answer to the bill charges that the property sold by Van Norden was of infinitesimal value, and that the sale for the price stipulated to be paid therefor was a fraud on the city and its taxpayers (R., p. 199).

But as Van Norden is not connected with the alleged fraud by any specific averment, or by any proofs in the record, and no relief is prayed with reference to the sale on that account, by cross bill or in the answer, and no ruling of the Court on the subject is assigned as error, the language used must be treated as simply scandalous and without effect.

The admitted truth is that the appraiser appointed by the city found that the dredge boats and machinery cost originally $205,000, and he valued them, deducting 25 per cent. for depreciation, at $153,750 (R., p. 91).

The balance of the price was paid for the franchise, as authorized by the act of 1876. If any element of fraud existed it is chargeable solely to the city in getting possession of the property with the confessed intention of not paying for it.

X.

Another complaint is that the Court of Appeals erred in not giving due effect to the appointment of a receiver for drainage taxes, and requiring complainant to proceed against such receiver.

The only averment in the answer on this subject "is that in the case of vs. this defendant was ordered and rendered an account of all drainage taxes, and defendant submits that there is no reason to renew the call or order for such account" (R., p. 199). But there is no suggestion that there was a receiver in the case, nor that the city had discharged itself of liability by paying the drainage fund into the hands of any receiver. On this state of the record we submit that the Court of Appeals gave due effect to such a plea by ignoring it.

XI.

Another complaint is that the Court of Appeals erred in overruling defendant's pleas of prescription of five and ten years. It is claimed that the warrants sued on fall within the prescription of five years established by Art. 3540. This article reads as follows:

> "Actions on bills of exchange, notes payable to order, or bearer, except bank notes, those on all effects negotiable, or transferable by endorsement or delivery, and those on all promissory notes, negotiable, or otherwise, are prescribed by five years, reckoning from the day when the engagments were payable."

Under the settled rule in Louisiana, this article applies exclusively to unconditional promises to pay a fixed sum of money, whether the obligation be negotiable, or not. Instruments lacking these essential characteristics have never been held to come within its provisions.

Any condition inserted in an obligation takes it out of this rule.

Lewis vs. Thompson, 22 An. 450.

Thus it was held in Bird vs. Livingston, 1 Robinson, La. Rep. 183, that an order payable out of a particular fund, when collected, does not come within the article. So it was held in Jouett vs. Irwin, 9 La. R. 231, that an agreement of an agent to collect and pay over the proceeds of notes placed in his hands for collection, as it did not bind him absolutely, does not fall within the class of instruments prescribed by five years.

Classifying these very drainage warrants and defining their character in the case of Davidson vs. New Orleans, 34 La. An. 177, the Supreme Court says:

> "Payment of these warrants is therefore to be regulated by the provisions of the authority under which they were issued, and that authority expressly confines it exclusively to a special fund when realized, and if realized it takes place from the drainage assessments and not otherwise. The payment therefore was to be completely hypothetical, contingent upon eventualities, susceptible of happening, or not."

The prescription applicable to warrants of the same character as those involved here has heretofore been the subject of judicial decision in the courts of the State.

In Fisher vs. Board of Directors of the City Schools of New Orleans, 44 La. An. 185, the plaintiff brought suit on certificates issued to teachers of the public schools for their salaries, which were payable out of the revenues of the board for the year in which they were issued, and prayed for judgment payable from the school taxes levied by the city of New Orleans prior to 1879. The board denied any indebtedness; but judgment was rendered recognizing the plaintiff as a creditor of the scool fund, to be paid in due course, out of the school taxes levied prior to 1879. This judgment was affirmed on appeal, the Supreme Court holding that although the judgment could not be executed, it served the purpose of a recog-

nition of the claim of the holders to be paid out of taxes levied in 1873 and subsequent years when collected.

Later, a similar suit was brought by James F. Gasquet, to which the board for the first time pleaded the prescription of five and ten years. The District Court overruled the pleas and rendered judgment against the board in the same form as in the Fisher case. Upon appeal the Supreme Court, after reviewing its former ruling, said:

> "We think the pleas of prescription are not well founded. Act 36 of 1873 makes it very clear that the claims evidenced by these certificates were not payable absolutely, or at any particular time. They are payable only out of the revenues of the year for which they were issued, and only when said revenues are collected, and in the manner therein provided; and the act further declared that no writ of *fi. fa.* or mandamus shall lie for the seizure of any school money, or to direct or enforce its paying out, otherwise than in the manner and sequence required in this act. This law formed a part of the contract out of which these claims arose, and deprived the claimants of any legal remedy to enforce payment, except out of particular revenues when collected and turned into the treasury. The case is very much stronger and clearer than that of Kings Bridge Manufacturing Co. vs. Otoe Co., 124 U. S. 459, in which the Supreme Court of the United States held that county warrants, payable only when there are funds in the treasury applicable thereto, are not actionable until the money for their payment is collected, and therefore not subject to the statute of limitations except from the same time. There is neither allegation nor proof in this case that there have been at any particular time funds in the School Board treasury applicable to the payment of these claims, and we can not assume that such fund exists beyond the term of five or ten years. The party who pleads prescription is bound to prove the fact necessary to sustain it. The present action itself is not properly an action of debt but is in effect simply an action to compel recognition

of the certificates as entitled to participate in the distribution of the fund applicable thereto, now or hereafter collected."

Gasquet vs. School Board, 45 An. 342.

This decision of the Supreme Court of the State is clearly decisive of the question of prescription involved in this case. In that case the defendant alleged that it had no unexpended money in its hands derived from the revenues, of the years out of which the certificates were payable, applicable to their payment. And the Court held that the Board not having alleged that it had funds in its possession at any particular time within five or ten years so applicable, the plea of prescription must be overruled.

Here the city admits that it has collected some drainage taxes, as the School Board did, but alleges that the whole fund has been accounted for and applied in accordance with law (R., p. 195), without averring or showing that there was ever at any time money in its hands, within five or ten years prior to the date plaintiff's bill was filed, applicable to the payment of purchase warrants as a starting point for the statute of limitation to commence running.

It was for this precise reason that the Court denied the plea of the statute of limitation in King Bridge Manufacturing Company vs. Otoe, 124 U. S. 459, referred to in the Gasquet case.

Moreover, the answers of the defendants denying the possession of any fund applicable to the payment of the certificates and warrants, were repugnant to the pleas, and, on well established principle, had the effect of overruling them, even if they had been properly drawn.

The judgment in the Fisher case having been a mere recognition of his right to be paid out of the revenues of a particular year, when collected, afforded him no relief. And, as might be supposed, he was compelled to bring another suit to obtain satisfaction. He accordingly filed a bill in the United States Circuit Court against the School

Board and the city of New Orleans, similar to the one in this case, for an accounting of school funds alleged to be applicable to the payment of his certificates, but withheld. To this action the board pleaded the prescription of ten years. But the Court overruled the plea, and on the merits decreed the board and the city accountable for certain funds which it found ought to be applied to the payment of the certificates. This decree was affirmed by the Circuit Court of Appeals, January 17, 1899, under the authority of the decision in the Gasquet case, the Court holding that as the certificates were not prescribed the action for an accounting was not.

City of New Orleans vs. Fisher, 91 F. R., p. —.

The proceeding in this suit is of the same character, with the single difference, that instead of first obtaining a valueless judgment at law recognizing his right to be paid out of the drainage fund when collected, the complainant has filed a bill praying recognition of his claims, and the establishment of a fund for their payment, for the purpose of obtaining that full relief in a single suit, which a court of equity is always competent to afford.

Considering the question of prescription as a purely legal one, apart from any element of trust, we submit that the ruling of the Court of Appeals was entirely correct under the settled jurisprudence of the State of Louisiana and of this Court on the subject.

The prescription of ten years, although covered and disposed of by the decision in the Gasquet case, seems to require some further consideration, as it is sought to be applied to the judgments against the city rather than the action to the action for an account. Error in respect to the ruling of the Court of Appeals on the plea is set ou in the tenth assignment (R., p. 580).

The substance of the assignment is that, notwithstanding the recognition of the trust by the city resulting from the averment in its answer that it had up to the date of the

filing of the bill collected some drainage taxes due by private persons and applied them according to law, and had continually endeavored, by all means in his power, to collect other taxes and to complete the drainage work, still the judgments against the city became prescribed in its hands by the lapse of ten years, under Art. 3449 of the Civil Code, because the city in its answer had denied their validity; and that for this reason the Court erred in holding that the recognition extends to the judgments against the city and takes them out of prescription.

The contention seems to be that the judgments against the city, composing part of the trust fund in its hands, became prescribed by the mere lapse of time, notwithstanding the fact that it was actively engaged in executing the trust during the same period. But no authority is cited, and none ought to exist, for such a proposition. On the contrary, the law is well settled, at least in Louisiana, that there is no such thing as prescription running in favor of a trustee against a debt which he owes to the trust. This the Supreme Court of the State expressly decided in McKnight vs. Calhoun, 36 La. An. 408, in which the Court held that an administrator, so long as he administers an estate, can not plead the statute in discharge of his own liability to the estate. Upon the same principle, it was held in Succession of Farmer, 32 La. An. 1037, that prescription does not run on a claim of an administrator against the estate so long as he remains such administrator.

The maxim *Contra non valentem* applies to parties so situated.

In this respect no such distinction exists between judgments and ordinary debts, as is suggested by the learned counsel for appellant.

Judgments are debts in Louisiana, as elsewhere, and although they may be kept alive by suit to revive, as authorized by Art. 3547 of the Civil Code, this mode is

not exclusive of other methods. At one time it was supposed that the statute operated silently upon the judgment and extinguished it at the end of ten years by the mere passing of time, unless revived by suit under that article, but the Supreme Court of the State has in two well-considered cases recently decided that the prescription of judgments may be interrupted, or suspended, in the same manner and for the same causes which operate with regard to ordinary debts (Levy vs. Calhoun et al., 34 La. An. 413; Succession of Saunders, 37 La. An. 769).

Not only is the statute suspended as to debts due by a trustee to the estate he administers, but he is treated, in law, as if he had collected the same, and is chargeable with the amount as an asset in hand.

Says Perry on Trusts, Sec. 440:

> "If a trustee himself owes the estate he must treat his indebtedness as an asset collected."

In Sigourney vs. Wetherll, 6 Metcalf, 557, the Court said:

> "It is now well settled, whatever may have formerly been the rule, that a testator by making his debtor executor does not give him the debt by way of legacy, nor release, or discharge it. But as an executor or administrator can not demand or receive payment of himself, and can not sue himself, and yet is bound to account for his own debt, that debt must be considered as an asset. Where the same hand is to pay and receive money the law presumes as against the debtor himself that he has done what he was legally bound to do and charged himself with the amount as a debt paid."

See also Commonwealth vs. Gould, 118 Mass. 307, and cases therein cited.

The rule leaves no field for the operation of the statute in this case. We come now to consider as to what extent and under what circumstances prescription is applicable.

to an action brought by a *cestui que trust* against a trustee to enforce his rights.

The general rule is clearly stated by this Court in Lewis vs. Hawkins, 23 Wallace, 126, as follows:

> "As between trustee and *cestui que trust*, in case of an express trust, the statute of limitations has no application. Accounts of administrators have been decreed against trustees extending over periods of thirty, forty, and even fifty years. The relations and privity between trustee and *cestui que trust* are such that the possession of one is the possession of the other, and there can be no adverse possession during the continuance of the relation."

Says Perry on Trusts, Sec. 863:

> "The trustee must clearly repudiate the trust with notice to the *cestui* before the statute can begin to run. The mere fact that money due the *cestui* is allowed by him to remain in the trustee's hands, does not change the nature of the debt; it continues to be a trust debt, upon which neither the bankruptcy of the trustee, nor the statute of limitations can take effect."

The rule in Louisiana under the civil law is the same. The most conclusive decision on the subject is found in Southern Mutual Insurance Company vs. Pike, 32 La. An. 483. That was a suit brought against the heirs of W. S. Pike for an accounting of the assets of the plaintiff company, which were charged to have come into his hands as treasurer. In the first instance the Court held that, under the civil law, there was no prescription which would protect an agent from accounting. Subsequently, upon the coming of the account, the Court allowed the time for prescription to begin running from the date of the last entry made by Pike in the books of the company (*Id.*, p. 488), treating the entry as the latest act of recognition of the trust, and as the starting point of the statute of limitations.

In the present case the defendant's answer expressly recognizes the trust by alleging performance, and tendering an account which shows collections of drainage taxes since 1871, the last entry being for an amount collected on the 20th of June, 1891, only three years before the bill was filed (R., pp. 343-8).

Our case comes clearly within these rules which the courts of the State have recognized as governing ordinary trusts arising out of agency and similar relations. Those courts, however, have held in a later case that prescription has no operation on trusts created, as in this case, by statute.

In School Directors vs. City of Shreveport, 47 An. 1310, which was an action to compel the defendant to account for a fund alleged to have been collected for the plaintiff, but withheld, the Court said:

> "The amount collected by taxation for a specific purpose is a trust fund. The application of the fund is usually enforced by mandamus. We can not see the application of prescription to protect a municipal corporation from liability for the fund thus collected and withheld."

And the learned counsel for the city after claiming prescription against the warrants and against the action have finally admitted the full force of this decision, for, at page 29 of their brief filed in support of the application for certiorari, they say:

> "The city does not plead prescription against her accountability as trustee of the drainage taxes. She claims the judgments against herself had been extinguished by prescription."

In conclusion on this branch of the case, we call attention to the fact that the plea of prescription of ten years covers only plaintiff's action, and does not purport to extend to the judgments against the city. And the plea, so

far as it applies to the action, is fatally defective in not alleging that it disowned the trust and ceased to act, at any particular time, ten years prior to the filing of the bill.

It fixes no date for the beginning of the statute, which is fatal to the plea under the rule laid down in the Gasquet case. Moreover, if the plea had been properly framed to bring the city within the rule, the allegations of performance and execution of the trust up to the date of the filing of the bill is repugnant to and overrules it.

It only remains to consider the suggestion that the warrant holders, being parties in interest, ought to have brought suits to revive the judgments, as the city could not sue itself.

This supposed difficulty, however, seems only to have been discovered after the present suit was filed, for the city actually brought proceedings in its own name, to revive the judgments in the Second and Third Districts; and obtained orders reviving them (R., pp. 54, 68, 70, 78). In one of the petitions to revive, the city states that in its opinion the proceeding was unnecessary, but had brought it out of abundant caution to protect the interest of all parties (R., p. 78).

In this we quite agree with the city, for if the city was incapacitated to sue owing to her double character of debtor and trustee, prescription was clearly suspended under the maxim *contra non valentem*, and revivor was unnecessary.

But if the city had really desired to do its duty, the mere filing of a petition to revive would have answered every purpose, as it would have recognized the debt, and interrupted the course of prescription. Why the necessity of the warrant holders filing a petition to revive under these circumstances? The duty to preserve the fund rested on the city, and not on them.

XII.

Another complaint is that the Court of Appeals erred in its construction of the amendment of the Constitution of the State of 1874, limiting the debt of the city of New Orleans.

This amendment reads as follows:

> "The city of New Orleans shall not hereafter increase her debt in any manner or form, or under any pretext. After the 1st of January, 1875, no evidence of indebtedness or warrant for the payment of money shall be issued by any officer of said city except against cash actually in the treasury; but this shall not be so construed as to prevent a renewal of matured bonds at par, or the issue of new bonds in exchange for other bonds, provided the city debt be not thereby increased; nor to prevent the issue of drainage warrants to the transferee of contract under Act No. 30 of 1871, payable only from drainage taxes, and not otherwise."

The contention is that the act of the Legislature which authorized the city to purchase the drainage plant and franchises is null and void, because it had the effect of increasing the debt of the city in violation of the supposed prohibition contained in said constitutional amendment of 1874.

Our answer to this is that the assessments, both against the city and individuals, were all in existence long prior to the adoption of said amendment, and were levied and reduced to judgment as follows:

That in the First District was levied on September 13, 1861 (R., p. 110), and reduced to judgment for the first instalment thereof on March 11, 1863 (R., p. 24), and for the remaining instalments on March 21, 1874 (R., p. 28).

That in the Second District was levied March 11, 1861 (R., p. 111), and for the part of said district lying in the

parish of Jefferson was reduced to judgment March 15, 1869 (R., p, 50), and for that part of said district lying in the parish of Orleans was reduced to judgment November 16, 1868 (R., p. 62).

That in the Third District was levied June 11, 1872 (R., p. 111), and was reduced to judgment November 13, 1872 (R., p. 74).

That in the Fourth District was levied November 19, 1872 (R., p. 112), and was reduced to judgment March 15, 1873 (R., p. 89).

It seems to us that by its clear and express terms the amendment excludes from its operation the liability of the city, whatever such liability may be, growing out of its relation to drainage matters. The ordinance left, and intended to leave, untouched all such liability. It, in effect, affirmed the existence of the drainage fund in all its component parts, including the liability of the city as assessee of the streets, squares and other public places, which constituted nearly one-half of the fund; and it affirmed that the fund so established was applicable to the payment of all warrants drawn against it for drainage purposes, and incidentally recognized the validity of the act of 1871, which confirmed and made exigible—*i. e.*, payable—the assessments against the city, as they appeared in the various tableaux and judgments rendered thereon. And lastly, it recognized and established the validity of the drainage contract, and affirmed the right of the city to issue, and of the transferee of the contract to receive, warrants against the fund, as the Supreme Court of the State declared in 27 An. 497, where the court, at p. 499, said:

> "The transfer, whether in pledge or in full property, made to him by said company, has been recognized by the Legislature in Act 22 of the Acts of 1874, proposing an amendment to the Constitution, limiting the debt of New Orleans, and is now a part of the organic law of this State."

No other construction can be given the amendment without imputing to its authors the intention of defrauding those who might deal with the city under its invitation and permission.

Yet the Court is asked to hold, by construction, that a constitutional amendment which authorized the city to draw warrants against this drainage fund operated to destroy aad render it valueless by prohibiting the city from paying into the fund the taxes out of which the warrants were to be satisfied. Authority to draw warrants against the fund necessarily carried with it by implication a duty and obligation on the part of the city to apply the drainage taxes, including those the city itself owed, to their payment. These taxes being debts of the city at the date of the adoption of the amendment, can not by any reasoning be included in the clause prohibiting an increase of the indebtedness of the corporation after January 1, 1875. The amendment, even if it had provided in express terms that no debt of the city of New Orleans should be valid, would be construed to apply to future transactions only, for it is a fundamental rule of interpretation that laws apply to the future and not the past.

McEwen vs. Dew, 24 H. 242.

But construing the amendment from a broader standpoint, and in the light afforded by the circumstances under which it was adopted, it seems clear that the authors intended to exclude all matters of drainage from its operation, and to leave the city free to carry out the plan of improvement then in course of execution. The drainage work has been in progress during three years and was yet unfinished; and we think it may fairly be assumed that the purpose of inserting a clause in the amendment authorizing the city to draw warrants, payable out of drainage taxes, was to permit the city to complete the improvement, and to use the drainage fund to its full extent for that purpose, as provided in the legislation then in force. The

powers and duties of the city in this respect were neither abridged in terms, nor increased, but were on the contrary expressly continued and affirmed.

It is contended, however, by the learned counsel for defendant that the assessments against the city are void and do not constitute a debt of the city, and that therefore the act of 1876, authorizing the purchase from Van Norden, increased the debt of the city contrary to the prohibition contained in the amendment, and for that reason is void.

Our answer to this is that even if the drainage taxes assessed against the city were not debts, the amendment simply prohibits an increase of the city debt after January 1, 1875, but imposes no limitations on its right to contract an indebtedness after that date, unless its debt should thereby be increased in excess of the amount it then owed. Whether, therefore, the act of 1876, authorizing the purchase, increased the debt, is a question of fact, which can only be determined by evidence showing the amount of the debt on the first day of January, 1875, and on the 6th of June, 1876, when the purchase was made. Neither the pleadings nor the proofs in this case show these facts. If, therefore, the act of 1876 did, in fact, for the first time impose on the city a liability for drainage taxes to the extent of $300,000, as contended by defendant's counsel, it does not follow that the debt of the city was increased thereby. Certainly this Court can not assume the existence of the fact to support a mere suggestion that a law of the State is unconstitutional. On the contrary, courts always indulge the presumption that the Legislature, before passing a law the constitutionality of which depends upon the existence of particular facts, found the facts to be such as to warrant the legislation.

In Cooley's Constitutional Limitations (5 Ed. 222) the author says:

"If evidence was required, it must be supposed that it was before the Legislature when the act was passed; and if any finding was required to warrant the passage of the special act, it would seem that the passage of the act itself might be deemed equivalent to such finding."

A very full discussion of this question will be found in the case of United States vs. Demoines, etc., 142 U. S. 544, to which we refer the Court.

But it can make little difference whether the act of 1876 was constitutional or not, because defendant has had the benefit of the act of the Legislature of which he now complains, in the acquisition and enjoyment of property, acquired at a purchase made in pursuance of the provisions thereof.

In Daniels vs. Tierney, 102 U. S., page 415, the Court, at page 421, said:

"It is well settled as a general proposition, subject to certain exceptions, not necessary to be here noted, that where a party has availed himself, for his own benefit, of an unconstitutional law, he can not in a subsequent litigation with others, not in that position, aver its unconstitutionality as a defence, although such unconstitutionality may have been pronounced by a competent judicial tribunal in another suit. In such cases the principle of estoppel applies with full and conclusive effect."

If the act of 1876 was in fact unconstitutional, the city of New Orleans contracted to purchase in error of law. D'Aguesseau, in his dissertation on Mistakes of Law, printed in Vol. 2 of Pothier on Obligations, p. 350, says:

"Error of law ought not to give any person a title of acquisition; the reason is evident, and Cujas comprises it in his Commentary on Law, 8 ff. *de juris facti ignorantia*, otherwise an ignorance of law would be an advantage to one making a mistake. * * * Hence those solemn definitions of law; ignorance of the law does not profit those who are desirous of acquiring an advantage."

Domat, after declaring that error of law is not sufficient as an error of fact is, to annul contracts, says:

> "(1) If error, ignorance of law, be such that it is the only cause of the contract in which one obligates himself to a thing to which he is not otherwise bound, and there be no other cause for the contract, the cause proving false, the contract is null. (2) This rule applies not only in preserving the person from suffering a loss, but also in hindering him from being deprived of a right which he did not know belonged to him. (3) But if by an error or ignorance of the law one has done himself a prejudice which can not be repaired without breaking in upon the right of another, the error shall not be corrected to the prejudice of the latter."

See note at foot of Sec. 139, 1 Story Equity Jur.

Says the Supreme Court in Griswold vs. Hayard, 141 U. S. 284:

> "Mere mistakes of law stripped of all other circumstances constitute no ground for the reformation of written contracts."

And the law of Louisiana is in harmony with these principles, for Art. 1846 of the Civil Code declares that error at law can never be alleged to acquire the property of another.

XIII.

Another complaint is that the act of 1876 did not provide for the payment of interest, and that the Court of Appeals erred in allowing interest.

This, however, is not alleged by the city as a defence. In its amended answer (R., p. 202) after reiterating the averments of the original, it merely says, "this respondent is in no manner bound, or liable in any manner on, or for, or in respect to said warrants, and least of all, for any alleged interest thereon," but the authority to stipulate for interest on the warrants under the act is not questioned

The objection now made that the stipulation is *ultra vires* is sought for the first time to be imported into the record by the assignment of errors. This can not be done.

Aside from this, however, there is nothing in the objection. The act of 1876, after authorizing the city to make the purchase, provided in the 33d section, "that all amounts to be paid, when agreed upon, shall be paid in drainage warrants by the city of New Orleans, which said warrants shall be issued *in the same form and manner* as those heretofore issued to the transferee of said company under Act No. 30 of acts of 1871 for work done. They shall be paid out of drainage assessments."

The form and manner of issuing warrants under that act is prescribed by the 8th section, as follows:

> "It shall be the duty of the Administrator of Accounts on the presentation to him of said certificates of the City Surveyor or Engineer appointed by the Board of Administrators, by the President of said Mississippi & Mexican Gulf Ship Canal Company, to draw a warrant or warrants on the Administrator of Finance, in payment of the work so done, at the rate of fifty (50) cents per cubic yard of excavating and fifty (50) cents per cubic yard for protection levee, and said warrants to be of such denomination as may be required by the president of said company. These warrants it shall be the duty of the Administrator of Finance to pay on presentation to him, in case there be any funds in the city treasury to the credit of the said Mississippi & Mexican Gulf Ship Caoal Company; but should there not be sufficient funds to cash the said warrant or warrants, then the Administrator of Finance is hereby required to endorse upon the same the date of presentation, after which date the said warrant or warrants shall bear interest at the rate of 8 per cent. per annum until paid, which condition shall be set forth in the form of the said warrant or warrants."

The purchase warrants were issued in exact compliance with the requirements of said section.

They were drawn by the Administrator of Accounts on the Administrator of Finance, and contained the condition that if not paid in cash on presentation, the fact should be endorsed on them in writing by the Administrator of Finance, and that they should thereafter draw 8 per cent. per annum interest until paid. That they were presented for payment, but not paid at the date of the sale, appears from the proper written endorsement made on each warrant (R., p. 109).

In prescribing this form of warrant to be issued, we submit that the act of 1876 expressly authorized the city to stipulate for interest.

Indeed, if the act had been silent on the question of interest, it is clear that the authority to pay the purchase price in warrants payable in the future, would necessarily carry with it the implied authority to contract for interest, just as authority to an agent to borrow money has been held to grant, by implication, the power to secure the loan by a pledge of the property of the principal (Hatch vs. Coddington, 95 U. S. 48).

XIV.

It is further claimed that the Court of Appeals erred in decreeing the city to be an absolute debtor for the amount of the warrants sued on.

But the slightest examination of the decree will show that the Court merely found as a fact that the city was a debtor for the amount of the warrants sued on by complainant, and that he and others similarly situated who might prove their claims will, upon an accounting of the drainage assessments, be entitled to absolute judgments against the city to the extent of the fund that may be established for their benefit (R., pp. 514–5).

The decree is perfectly correct in form and substance,

and was the only decree the Court could properly render after finding the city liable to account for the drainage fund.

Wherefore appellee prays that the decree of the Court of Appeals be affirmed.

Respectfully submitted,

J. D. ROUSE,
WM. GRANT,
Solicitors for Appellee.

No. [illegible]

Brief of [illegible]

United [illegible]

[illegible]

Filed [illegible] 13, 18[illegible]

No. [illegible]

CITY OF NEW ORLEANS,

Defendant and Petitioner,

versus

JOHN G. WARNER,

Complainant and Respondent.

CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF OF COMPLAINANT.

RICHARD DUGRAY,

Solicitor for John G. Warner.

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United States Supreme Court.

No. 640.

CITY OF NEW ORLEANS,
Defendant and Petitioner,

versus

JOHN G. WARNER,
Complainant and Respondent.

OCTOBER TERM, 1898.

CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF OF COMPLAINANT.

We are embarrassed in the discussion of the merits of this case as we are without an assignment of errors by the party complaining of the decree below, but taking the various points urged for the issuance of the writ as an assignment of errors (after making a statement of the case,) we will try to answer said points in the order in which they are presented and at the same time will discuss the city's liability not only on the assessments against herself duly reduced to judg-

ment, but also her liability for the assessments against individuals—also reduced to judgment—resulting from her conduct in reference to the same, also her liability with reference to both of the above assessments to the full extent of the drainage warrants drawn against said assessments under the act of sale of June 7, 1876, resulting from the unwritten and implied warranties in said sale, as well as from the written warranties in said act of sale contained.

The grounds urged are as follows:

First. Because the amount in dispute is large (25 paragraph of petition.)

Second. Because the Circuit Court of Appeals misapprehended, and wrongfully applied the decision rendered by this Honorable Court in Warner vs. New Orleans, 167 U. S., p. 467. (26 and 27 paragraphs of petition.)

Third. Because the decision of the Circuit Court of Appeals to the effect that streets, squares and other public property were subject to assessment to pay costs and expenses of drainage, and that this had been decided in Warner vs. New Orleans, is erroneous, and that the opinions of the Supreme Court of Louisiana, under which this conclusion is said to be justified, are based on entirely different statutes from those on which the present assessments are based and do not apply. (28th and 29th paragraphs of petition.)

Fourth. Because the Court erred in holding that the constitutional amendment of the State of Louisiana, going into effect on January 1, 1875, instead of being a prohibition against increasing the debt of the City of New Or-

leans, really was, by reason of the authority therein contained, an implied affirmance of the right to complete the drainage then in progress, and implied a corresponding duty on said City to collect the drainage taxes and apply the same to the payment of the drainage warrants of the class sued upon. (30th paragraph of petition.)

Fifth. Because the Court erred in disregarding the prescription of five years under Art. 3540 of the Civil Code of Louisiana, and the prescription of ten years under Art. 3544 of said code. (31st paragraph of petition.)

Sixth. Because the Court erred in not allowing the plea of *res adjudicata* based on the decision in Peake vs. New Orleans, 139 U. S., p. 342, (32nd paragraph of petition) the scope, meaning and construction of which, it is claimed, is peculiarly within the supervisory power of this Honorable Court. (36th paragraph of petition.)

Seventh. Because the Court erred in decreeing the City was the absolute debtor of the drainage warrants sued upon, while all the bill sought to obtain was an accounting of the drainage taxes, and that, in no event, could the warrants sued upon be considered the unconditional obligations of the City until it was shown all the taxes had been lost, misapplied or misappropriated, even if then, which is denied. (33rd paragraph of petition.)

Eighth. Because of the numerous error (19) set forth in the assignment of errors filed in the United States Circuit Court of Appeals with a petition for a rehearing in that Court. (34th paragraph of petition.)

Ninth. Because the Court wrongfully allowed 8 per

cent interest on the warrants sued upon. (35th paragraph of petition.)

Tenth. Because the Court erred in not holding the contract of sale, under which the warrants in suit were issued, most unfair and inequitable because Van Norden, the seller of the property for which said warrants were given had bought the dredge boats and paraphanlia for $50,000 in 1872, and sold the same in 1876, after being in use for the intervening period for $300,000 in drainage warrants exceeding five times the amount paid for the same, and said sale was therefore a fraud on defendant. (37th paragraph of petition.)

STATEMENT OF THE CASE.

In June, 1876, Warner Van Norden was and for some time prior thereto, had been the owner of a large draining plant in the City of New Orleans, and the pledgee and transferee of a franchise granted by the Legislature of the State of Louisiana for doing drainage work.

While thus owner and transferee, as aforesaid, the legislature of said State, on the 24th day of February, 1876, authorized said City of New Orleans, in case it should be deemed advisable, to purchase the above plant and franchise, upon appraisement to be made, and when made to be paid for by drainage warrants drawn against drainage taxes, in the same manner and form as those issued under Act No. 30 of the Acts of the legislature of 1871.

The option and privilege thus granted, said City accepted, caused the appraisers therein provided for to be

appointed (to-wit: the engineer of said City, R., p. 104) who reported the value and condition of the property, (R., pp. 91 to 97), and thereafter the Mississippi and Mexican Gulf Ship Canal Company, and said Van Norden, who was the transferee thereof, executed a bill of sale for said property to said City of New Orleans, and delivered the same, and said city, in accordance with said act granting her the privilege to purchase in case she deemed it advisable to do so, delivered to said Van Norden $320,000 of drainage warrants, drawn in the form and manner provided for under said Act No. 30 of 1871, $300,000 of which were delivered for the property purchased, and $20,000 in compromise for certain alleged misappropriation of drainage taxes collected by said city. (R., pp. 97 to 104.)

This bill of sale among, other things, contained this covenant, duly signed by said city, "not to obstruct or impair, but, on the contrary, to facilitate by all lawful means the collection of the drainage assessments as provided by law, until said warrants shall have been fully paid, it being understood and agreed by and between the parties hereto, that collections of drainage assessments shall not be diverted from the liquidation of said warrants and expenses as herein provided for under any pretext whatever until the full and final payment of the same. (R., p. 102.)

The drainage taxes against which said drainage warrants were drawn and delivered were created pursuant to the following Acts of the Legislature of Louisiana:

In 1858 an Act was passed providing for the drainage of certain portions of the Parishes of Orleans and Jefferson (which were divided into three drainage districts) and

directing that certain proceedings be had by certain commissioners to be appointed pursuant to said act to carry on said drainage, in certain Courts, to declare the land to be drained subject to a first mortgage lien and privilege for the cost of draining the same, and the said act provided that thereafter certain assessments should be levied by said commissioners in said districts, upon the superficial or square foot of the lands situate within the drainage districts, and that assessment rolls should be prepared fixing the amount to be paid by the owners of the land, upon which suit might be brought in case of non-payment, (Statutes pp. 1 to 6). In 1861 an amendment was passed to said law providing for a summary mode of collection of said assessments, under which said rolls were to be filed in certain Courts, certain notices issued, and that thereafter said assessment rolls should, by said Courts, be approved and homologated, which approval and homologation said law dec lared should be a judgment against the owner and the property issued (Statutes pp. 8 & 9).

Under these laws some of said mortgages had been declared, assessments made and the assessment rolls homologated prior to said Act No. 30 of 1871, which abolished said commissioners, transferred their rights, privileges, property and said assessments to the Board of Administrators of the City of New Orleans, who were subrogated to all the rights, powers and facilities of said commissioners, who were directed fo collect the assessments already levied, and to levy and collect others provided for, but not then levied and collected, and further to levy and collect assessments on additional land by said act brought

within the limits of the territory to be drained, which additional land was called the Fourth Drainage District.

All the additional proceedings required to be had by said Administrators of the city were by them had, (R p. 10) and as a result the total amount of assessments levied and reduced to judgment that came under administration by the City of New Orleans, was $1,699,637.16, of which the large amounts, set out in the bill, were levied and reduced to judgment against the City of New Orleans on assessments on the area of the streets, squares and public property and these amounts and the judgments therefor are admitted to be correct in the answer (R. p. 189).

Pursuant to said Act of 1871 the drainage work was to be done by said Mississippi and Mexican Gulf Ship Canal Company (whose transferee the said Van Norden became, as aforesaid), for which drainage warrants were to be drawn, payable out of drainage taxes, and about two-thirds of the work provided for by said act was done by said Company and said transferee prior to said sale (R. p. 274), but only $229,922.69 of said assessments had been collected by said city at the time of said sale, of which $78,748.51 was in cash and of this latter $23,666.59 (R. p. 320) was used to pay drainage warrants, leaving the balance then due and to be collected on June 6th, 1876, $1,464,714.47, the balance of the warrants issued by said city for work done by said Company and said transferee having been taken up by said city by the issue of bonds prior to January 1, 1875, pursuant to the provisions of Sec. 13 of Act No. 73 of 1872 (Statutes, pp. 13 & 14), and which bonds amounted to $1,672,105.21 (R. p. 343), but this act made said bonds a

claim on said drainage taxes second in rank to said drainage warrants, for it in terms provided, "that all taxes collected for drainage and not required for payment of drainage warrants shall be devoted to the purchase of the lowest bidder of bonds issued for drainage."

In this state of affairs, and when the total amount of the above bonds exceeded the total amount of drainage taxes then uncollected by something like $200,000, the Legislature of the State, on the 24th of February, 1876, (Statutes, pp. 15 & 16), one year and nearly two months after the last bond had been issued, and when in law it had full knowledge of the amount of bonds then issued and of the taxes outstanding, passed the said act authorizing said purchase to be made and to be paid for by warrants drawn against said taxes.

The bill, after stating the above facts, sets forth, (1) That after said city acquired said plant and franchise and became vested with the exclusive right to do all drainage, sat down on the work of drainage and abandoned the work already done, thereby causing the Supreme Court of Louisiana to decide the assessments could not be collected; (2) That she openly and publicly violated her aforesaid covenant to facilitate the collection of said taxes, by her conduct, ordinances and proclamations advising the parties owing the same not to pay them; (3) That she will plead she has been discharged from all liability to account for the drainage taxes she has collected, and ought to have collected, as well for the assessments due by herself by reason of the issuance of the bonds above stated; (4) That the city never, prior to the above purchase, claimed that the

issuance of said bonds operated as such discharge, save in the case of Peake vs. New Orleans, on the 19th of March, 1885, (more than 9 years after she had acquired said plant and franchise); (5) That said Act of 1876 was an authority to make said purchase, as well as a legislative recognition that said drainage fund had not been discharged by the issuance of said bonds, and was an appropriation and dedication of so much thereof as was necessary to pay said purchase warrants without offset or impairment; (6) That said contract of sale was entered into by said Van Norden in consideration of the provisions of said Act of 1876, and its effects on his rights and remedies, that neither at the time of entering into said contract of sale, nor at the time of the delivery of said warrants, or at any other time, did said city disclose she would claim that the issuance of said bonds was a discharge of her liability to account for, and apply said drainage taxes, including those due by herself to the payment of said purchase warrants, that said Van Norden was ignorant that she would make such claim, and would not have made said sale if advised any such claim would be made, and that complainant, who is the owner of three of said purchase warrants, aggregating $6,000, and all other holders of similar warrants have been, by a writing annexed to and made part of the bill of complain, subrogated to all the rights and remedies of said Van Norden, growing out of said sale, in consideration of all of which complainant avers said city is estopped in equity and good conscience from pleading and maintaining said defense.

The bill prays for an accounting of said drainage fund,

and especially that the amount due by said City of New Orleans be decreed a trust fund in the hand of said city, applicable to the payment of said warrants.

To this bill a general and special demurrer was filed in the Circuit Court, alleging: 1st, want of jurisdiction, because it was said the bill showed the suit was based on an assignment of a chose of action of which the original assignor was a Louisiana corporation and a citizen of the State of Louisiana; 2nd, because the matters sought to be litigated had already been decided in favor of defendant in the case of Peake vs. New Orleans, 139 U. S. 342 and following; and 3rd, there was no equity or cause of action set out in the bill (R. p. 166).

The matters thus raised were heard in the Circuit Court and the bill was dismissed at complainant's cost, and an appeal was thereupon taken to the Circuit Court of Appeals for the 5th Circuit, (R. p. 170) and said Court, after full hearing certified the case to the Supreme Court of the United States on the following questions: (R. pp. 174 to 179.)

First. Is the City of New Orleans, under the warranties, expressed and implied, contained in the contract of sale of June 7, 1876, by which she acquired the property and franchise from Warner Van Norden, and under the averments of the bill, estopped from pleading against the Complainant the issuance of bonds to retire $1,672,105.21 of drainage warrants, issued prior to said sale, as a discharge of her obligation to account for drainage funds collected on private property and as a discharge from her own liability to that fund as assessee of the streets and squares?

Second. Should the decision in the case of Peake vs. New Orleans, 139 U. S. 342, be held to apply to the facts of this case and operate to defeat the Complainant's action?"

The first question was answered in the affirmative, and the second the Court declined to answer as not involving a distinct question, but the whole case. See 167 U. S., page 467 and following.

Thereafter said Circuit Court of Appeals declared as follows:

"The City of New Orleans, under warranties expressed and implied ontained in the contract of sale of June 7, 1876, by which she acquired the property and franchise from Warner Van Norden, and under the averments in the bill, is estopped from pleading against Complainant below and Appellant here, the issuance of Bonds to retire $1,672,-105.21 of drainage warrants, issued prior to said sale, as a discharge of her obligation to account for drainage funds collected on private property and as a discharge from her liability to said fund as assessee of the streets and squares. Warner vs. City of New Orleans (167 U. S., p. 467).

On the case made by the Bill of Complaint, the decision of the Supreme Court in the case of James W. Peake vs. City of New Orlans, 139 U. S. 342, does not necessarily apply to the facts of this case, nor operate to defeat the Complainant's action. It follows that the Circuit Court erred in sustaining the demurrer to Complainant's bill.

The decree of the Circuit Court is reversed, and the cause remanded with instructions to overrule the demurrer to Complainant's bill, and thereafter proceed as equity and good conscience may require." (R. p. 180.

Thereafter the mandate of said Circuit Court of Appeals was filed in the Circuit Court, (p. 182) and the Complainant amended his bill praying that in said account interest be computed on said drainage tax judgments from the date thereof, at 6 per cent per annum, in accordance with the 7th section of Act 165 of 1858, (Stat. p. 4), and that Complainant be decreed interest at 8 per cent per annum upon the warrants sued on (R. p. 184), and thereafter Defendant answered the original and amended bills among other things setting up many of the matters already decided by this Honorable Court. Said answer, (pages 186 to 202) though very long, in substance, is as follows:

Though admitting the amount of assessments as stated in the bill, and that the assessment rolls were homologated by judgment of Court, said answer contends there was only a conditional liability imposed thereby, entirely dependent upon benefits to be conferred, and that this conditional liability was only confined to assessments on private property, but that the commissioners first, and the Board of Administrators afterwards, illegally extended said assessments to the streets and square and other public property in all of the drainage districts and homologated the rolls for said assessments, and contends that said assessments and judgments of homologation are absolutely null and void because levied on public property exempt from assessment; and that the portion thereof levied and homologated prior to said Act 30 of 1871, and by said Act confirmed and made exigable, are of no validity whatever, because based on the aforesaid public property and things not susceptible of assessment, and that said assessments, on both public

and private property in the Fourth Drainage District are wholly null and void, as was decided in 22 An., p. 33, because the law and the ordinance of the Council under which said District was created and said assessment levied, and the rolls therefor homologated, were unconstitutional. The answer also alleges the city has in all things done its full duty as to the collection of the drainage taxes from the time she took charge in 1874, under Act 30 of that year, until June 9th, 1891, when a Receiver was appointed, and that in all its efforts to collect said taxes it has disregarded all Acts of the Legislature and proceedings of the Council of the City of New Orleans in any manner calculated to interfere with and prevent said collections, and that it has faithfully applied every dollar of said collections according to law and accounted for the same, and that no more of said taxes can now be collected, since the consideration of said taxes has entirely failed, and this, because of what is called the plans of the Canal Company and Van Norden were insufficient and bad, and because the work done under said plans was defective, and improperly done, and that because of these things it has become the settled jurisprudence of Louisiana that no more drainage taxes can now be collected.

It is further contended said city has fully paid and discharged all of its liability, whether based on said assessments on the streets or on private property, by the issue and delivery of $1,672,105.21 of bonds of the "drainage series," to take up and retire drainage warrants; this it is protected from any claims of holden of purchase warrant by the amendment to the constitution of the State, preventing

the further issue of bonds, and going into effect on January 1, 1875; that the matter here are *res adjudicata* against Complainant, because of the decision in said Peake case; that the claim of Complainant on drainage warrants is prescribed by five years from their date, and that the judgments of homologation of the assessment rolls are prescribed, respectively, by ten years from the date of each judgment of homologation.

Thereafter replication was filed, and after the proofs were all in, the case was duly heard by the Circuit Court, and judgment was rendered dismissing Complainant's bill with costs, (R. p. 544), and thereupon an appeal was taken to said Circuit Court of Appeals with an assignment of errors to be found at pages 545 to 548 of the record.

Said Circuit Court of Appeals reversed the decree of said Circuit Court and decreed complainant was entitled to recover, and referred the case to a master to state the account out of which Complainant was to be paid, &c. (R. 550.)

Defendant then applied for an appeal to this Honorable Court, which was allowed by one of the justices thereof, (p. 584) and this appeal was dismissed on October 24th, 1898, in suit No. 336, October Term 1898, and thereafter applied for a writ of *certiorari*, which being granted the case is now here on the merits.

ARGUMENT.

I.

The amount in dispute as an argument for reversal we dismiss as unworthy of notice. The correctness of the de-

cree below is the only matter for the consideration of the Court.

II.

As to the al'eged misapprehension and wrongful application of the de:ision rendered in this Honorable Court in Warner vs New Orleans, 167 U S., page 467.

The Court there not only answered the question submitted to it, in the affirmative, to-wit:

"That the City of New Orleans was estopped from pleading against Complainant—the issuance of bonds to retire $1,672,105.21 of drainage warrants, issued prior to said sale, as a discharge of her obligation to account for drainage funds collected on private property and as a discharge from her own liability to that fund as assessee of the streets and squares.

But it also announced the legal principle by which this case was governed in these words:

"Whatever equity may do in setting off against all warrants drawn before this purchase from the canal company and its transferee, the bonds issued by the city (and in respect to that matter we can only refer to Peake vs. New Orleans, supra, it by no means follows that the city can draw warrants on the fund in payment for property which it voluntarily purchases, and then abandon the work by which alone the fund could be made good, resort to means within its power to prevent any payments of assessments into the fund, and thus, after violating its contract, promise not to obstruct or impede, but on the contrary, to facilitate by all lawful means, the collection of the assess-

ments, plead its prior issue of bonds as a reason for evading any liability upon the warrants. One who purchases property and pays for it in warrants drawn upon a particular fund, the creation of which depends largely on its own action, is under an implied obligation to do whatever is reasonable and fair to make that fun good. He cannot certainly so act as to prevent the fund being made good, and then say to his vendor, you must look to the fund and not to me."

How has the duty here pointed out—"the implied obligation to do whatever is reasonable and fair to make that fund good"—been performed by the city, or has it acted so as "to prevent the fund from being made good?—the fund, which, at the date of said sale on June 6, 1876, consisted of assessments against the City of New Orleans and individuals of $1,469,714.47, exclusive of interest, of which $696,394.30 was due by said city, and $773,320.17 by individuals. (These amounts are admitted to be correct. R. p. 189.)

And here we do not are to enter into any detailed discussion as to the conduct of said city as to the discharge of its duties under the drainage acts, under the Act 16 of 1876, and under the covenants in the bill of sale of June 7th, 1876, farther than to say that she has violated every duty imposed on her in reference to making said taxes collectable and collecting the same, every duty arising under the covenants in said bill of sale contained, and that every averment in the bill of complaint is true. We will, however, advert to some of the matter dislosed by the record.

When the city bought Van Norden's dredge boats and

apparatus(all of which were in the very best condition, with machinery in duplicate parts, so that if anything broke, it could at once be replaced with a new piece.) (Moody, R. p. 274). Report of Hardee (R. pp. 91 to 97) and became qualified to do the drainage work, and under the provisions of the Act of 1876 (Stat. p. —), possessed of the exclusive privilege of doing said work, she quietly abandoned said work. Moody, on page 110, (R. p. 274) after detailing the work done up to that time, and saying the work was about two-thirds completed, says there was no other work thereafter done by the city, and in fact there is no contention on the part of said city to the contrary. She not only abandoned said work, but proceeded to disqualify herself to do any work of drainage. This was judicially found in Davidson vs. New Orleans, 34 An. p. 170. See, also, reports Commissioner of Publib Works (R. p. 225 to 230).

On April 8th, 1878, by ordinance 4483, (R. p. 216) she instructed her Administrator of Improvements to advertise said dredge boats purchased from Van Norden and the Canal Company for sale. For some reason they were not sold, and on the 1st of July, 1878, by ordinance 6038 (R. p. 218) after reciting that three of said boats were then in bad condition and necessitated expense in watching, directed said Administrator to have said boats broken up, and the material stored. On March 17, 1880, after declaring parts of the wrecks of said boats, those borken up under the above ordinance, were valueless, except as old iron, and declaring the city needed lumber, spikes and nails for construction and repairing bridges, said city, by Ordinance

No. 6306 (R. p. 219) ratified an exchange of materials effected by said Administrator with Shwartz & Co., for said needed articles. On December 26th, 1880, the city surveyor, under Ordinance No. 6741, made the following report of the condition of said dredgeboats. (R. pp. 217 & 218.)

Hon. John Fitzpatrick, Administrator of Improvements,
City of New Orleans:

Sir:

In compliance with ordinance No. 6741, A. S., I have the honor to submit the following report as to the condition of the dredge boats belonging to this city:

Dredge Boat No. 1.

Now moored in Mississippi River, Algiers side, near Brady & McClellan's Dry Dock Co.; machinery on board; dipper and dipper handle lying on the bank.

Dredge Boat No. 4.

Sunk about twenty yards from dredge boat No. 1.

Dredge Boat No. 3.

Sunk in People's Avenue Canal; water foot and a half above boiler deck; impossible to ascertain what machinery the boat contains; hoisting and working chains not in sight; dipper lying about three hundred feet above the boat on bank of the canal.

Dredge Boat No. 2.

Dismantled; hull sunk in People's Avenue Canal.

Dredge Boat Clam Shell.

Dismantled and sunk in People's Canal.

Ridge Boat.

Dismantled and sunk in London Avenue Canal.

Dredge Noyes.

Now lying in Upperline Canal with machinery aboard; boat in leaking condition; inventory of tools, etc., found on board now on file in this office; also receipt for dipper loaned General Slaughter.

Your attention is respectfully called to Ordinance No. 6038, A. S., passed July 1, 1879, authorizing the dismantling of the Clam Shell, Ridge and No. 2, and ordering the machinery and old iron to be stored in Erato street yard. Ordinance No. 6039, A. S., passed March 17, 1880, shows what disposition was made of her machinery, old iron, etc., of the dismantled boats."

And thereafter, on the 5th day of April, 1881, by Ordinance 6970, the mayor of the city was authorized to issue, and on the following day did issue his proclamation (R. p. 271) advising drainage tax payers not to pay their taxes until the right to exact the same had been settled by the Supreme Court of the State (as if the validity of said taxes had not already been determined by the Courts in the First District, by the Supreme Court of said State (27 An., p. 20), and affirmed by the Supreme Court of the United States, 96 U. S. p. 97.)

But what decision did the mayor and council expect?

On the question whether the scheme which the city had entered upon after its purchase, of abandoning the drainage system and disqualifying herself to complete the same, as above stated, would be decreed a legal excuse to the tax payer for not paying his tax, and this it was declared to be by said Court in Davidson vs. New Orleans, 34 An., p. 170. In other words, whether her own failure of duty would be held as a legal obliteration of the taxes assessed against private individuals, and in this, as before stated, she was successful, for in the above case the Court, at page 175, after stating no benefits had yet been conferred to the property there sought to be relieved from the tax, etc., and speaking of "the abandonment of all drainage work, the disposition of all drainage apparatus, the impotency of the city to resume the work," etc., decided the tax could not be collected, and this has become the settled jurisprudence of the State.

After this decision a committee of the council, on the 15th day of May, 1883, (R. pp. 349 to 352) showed how the drainage tax payer, by availing himself of the benefits of the above decision could get rid of paying said taxes, and declared, "if the city, by any act of her own, would prevent the collection of the tax or annul it to the injury of warrant holders, * * * some liability might arise against the city," and concluded by saying, "they are of opinion the whole subject should be let to exhaust itself and work out its own solution," which it has been doing ever since.

And during all this time the city kept an office open, where the drainage tax payer might pay his taxes in case he saw fit to do so, but took no active means to collect said

taxes, or make them collectible, and as a result, the above report shows the collections (R. pp. 319 to 349) were not sufficient to pay the expenses of the officials of the office, and now declares that after being in charge of said collections and payments as a voluntary and contractural trustee from the time of said sale, in 1876, to June, 1891, she could not collect any more, because the same were uncollectible, because the drainage plan (which it declares was Van Norden's) was bad and the work done thereunder was poorly and defectively done, but this, as a matter of fact, is not true, as the plan (except as to a general provision for an outside protection levee, was that of the city herself, as an examination of the statutes and the ordinances of the city herself will show.

By the second section of the Act No. 30 of 1871, the Canal Company was authorized to dig a canal, and with the earth removed therefrom, to build outside said canal a protection levee in the rear of the city near Lake Ponchartrain, the location of said canal and levee, and all canals dug and levees built by said company to be designated and fixed by the Board of Administrators of the City of New Orleans, the said lake shore canal to be not less than sixty-five feet wide on the surface and fifteen feet deep in the middle, with proper sides; the said canals along the lake shore to serve as a reservoir for drainage of the city and lands in the rear, from which the drainage was to be pumped into the lake, said protetion levee to be not less than one hundred feet wide at its base and of sufficient heights to protect the city from overflow from said lake.

By the 3d section of said act, said company was authorized to excavate the canals of the dimensions and at such localities as might be fixed by said Board of Administrators, which should fully drain the area, bounded by protection levees therein contemplated, and the Mississippi River, and connect with the drainage canals there located in said area.

By the 4th section of said act said company was authorized to buid a canal and protection levee below the city to connect with the lower end of the protection levee along the lake and the Mississippi river, of a sufficient size to protect the city from overflow, on a line to be designated by said Board of Administrators, and to construct a like canal and protection levee above the city, the dimensions and locality in like manner to be designated by said administrators, the object of these canals and protection levees being the protection from overflow, etc.

By the 5th section of said act said canal company was authorized to dig all smaller canals required for drainage of New Orleans and lands in the rear of the dimensions of 10 feet or more in width, and by the 6th section of said act said administrators were directed to locate the lines of the canals and protection levees specified in the various sections of said act, and by said section it was further provided, that, should the City Council fail to locate the lines of said canals and protection levees as in said act specified, said city should be responsible in damages, and by the 7th section of said act it was made the duty of the city surveyor or other engineer to be appointed for the purpose to examine monthly the work done by said company during

each month and measure the width and depth of the canals dug and levees built, and certify the cubic yards thereof, on which drainage warrants were to be issued, etc.

So much for what the act of the legislature required to be done by the city.

And next as to what the city did do in pursuance of the provisions of said act in reference to said plan.

On the 27th of April she adopted ordinance No. 814, declaring that, whereas the Legislature by Act 30 of 1871 had made it mandatory on the Council of the City to provide, on the part of said city, for an extensive system of drainage, to lay out the lines and fix the location and dimensions of certain canals and levees, and in various ways to recognize the claims and accounts of and make settlement with the canal company in excavating said canals and building said levees, etc., ordained as follows: (Record, pp. 244 to 246.)

Sec. 1. That all matters appertaining to drainage and the protection of the city from innundation be placed in the immediate charge of the Administrator of Improvements, aided by the city surveyor.

Sec. 2. That the Mayor and Administrator of Finance be associated with the Administrator of Improvements as a standing committee on drainage; that said committee prepare a plan of the work to be entered upon immediately, and report to the Council at its next meeting what canals and levees or extensions of present canals and levees are most urgently required, and that upon the approval of the same by the Council, the Administrator of Improvements shall authorize the canal company to enter upon the

performance of said work under his (said Administrator's) direction, and said company was notified * * * that such work, and no other, as should be performed with the consent and approval of the Council would be settled for as in said ordinance, provided, viz.:

1. The city surveyor was to measure and certify all canals and levees then existing upon the line of the works entered upon so far as the same might form part of the canals and levees to be constructed, the same to be allowed for by said company in deduction of their measurements of work performed and completed.

2. The canal work was to be measured and certified monthly, and the levee work to be certified monthly, and certified so far as the same should have been shaped and completed and sufficiently dried for the passage of vehicles thereon, it being the intention of said ordinance that said levee should have the full dimensions required after the same was dried and ready for use.

3. That the earth removed from the canals and not required for levees should be the property of the city to be disposed of as she thought proper. That nothing in said ordinance was to be so construed as to imply that the earth taken from the canal and placed upon its banks should constitute a levee, but only such deposits as the committee should decide to be necessary for levee purposes should be paid for.

On May 4, 1871, the City Council adopted Ordinance 820, which authorized said company to commence the following named work subject to Ordinance No. 814, to-wit: (R. p. 246.)

"1. Clearing Hagan Avenue Canal to a depth of twelve feet; excavating a tail-race to connect with Orleans Street tail,race, and widening and deepening Orleans tail-race through the City Park.

"2. Excavating Fourteenth Street Canal through Metairie Ridge with protection levee on upper side.

"3. Widening and deepening Marigny Canal from Bayou St. John to Elysian Fields Street."

On June 29, 1871, said Council adopted Ordinance No. 344, (R. pp. 246 & 247) wherein it

"Resolved, That the drainage committee prepare a plan for the construction of a protection levee on or near the lake shore, which, after being approved by the Council, shall be the guide for the contractor and surveyor, under the direction of the Administrator of Improvements, in the execution of the work."

On the 18th of July, 1871, the Administrator of Improvements submitted to said Council a plan for the commencement of the work on the lake shore protection levee, which was adopted, (R. p. 258) and is in these words:

"The following plan is respectfully submitted for the approval of the Council as the most practical and permanent one for the commencement of a lake shore protection levee, viz.:

"Commencing at Upperline protection levee, extending in the lake to a depth of not over one foot of water at low tide, running in a westerly direction to the New Canal; also commencing at Pontchartrain Railroad to proposed Lowerline protection levee, being a distance of about two thousand feet."

On December 13, 1871, the said Council by Ordinance 1252. (R. p. 259.)

"Resolved, That the city attorney take such legal steps as may be necessary to cause the immediate expronpriation of such land and property as may be necessary for the proposed drainage canal from Galvez Street to Carrollton Avenue, running parallel to the New Canal, at a width of one hundred feet from the New Canal or State property."

On the 16th of February, 1872, by Ordinance 1362 the said Council amended the above Ordinance 820 to read as follows: (R. p. 259.)

"First paragraph to read:

"Excavating a tail-race from Hagan Avenue to Orleans Street; widening, deepening and extending Orleans tail-race from Bayou St. John to Lake Pontchartrain; excavating the canal parallel to the New Canal—authorized by Ordinance No. 1250 (1252) administration series—and cleaning out and deepening the Hagan, Carrollton, Broad and Galvez Street Canals.

"Second paragraph to read:

"Excavating the Upperline Canal near the old Carrollton Railroad and parallel with the same, with protetion levee on the upper side.

"Third paragraph to read:

"Widening and deepening Marigny Canal from Bayou St. John to Elysian Fields Street; widening and deepening the London Avenue Canal from Broad Street to the draining machine; widening and deepennig Broad Street Canal from Marigny Canal to the line of trees of said

Canal, and widening St. Bernard Avenue Canal from Broad Street to Claiborne Street.

"Provided the Council reserves the right to stop any portion of the foregoing work at any point of its progress."

On the 21st of February, 1872, by Ordinance No. 1374, it was ordained by said Council (R. pp. 260 & 319):

"That the contemplated canal on the north side of the New Canal, as adopted in the proceedings of October, 1871, be so located that the said canal be dug out of the middle of Poydras Street, commencing at Galves Street, to Carrollton Avenue, the earth to be thrown on the river side of Poydras Street."

And on the 4th of August, 1875, (R. p. 319) said Council by Ordinance No. 3209, ordained:

"Resolved, That a drainage canal be located on Nashville Avenue to connect the Claiborne Canal with the low ground or basin between St. Charles Avenue and the Mississippi River, said work to be performed by the Mississippi and Mexican Gulf Ship Canal Company, and the city surveyor is hereby authorized and directed to locate said canal so as to cause the least possible obstructions to the street."

The above embrace all the canals dug and levees built by said company and Van Norden, and every one of them was located by the city herself. The plan, therefore, was that solely of the city herself.

And how was the drainage work done by the canal company and Van Norden? Was it well done or defectively done?

As we have already shown, the whole matter was under the direction of the Administrator of Improvements and

his committee, as well as under the supervision of the city surveyor, and under Ordinance 814 it was only such work as was actually done that was to be measured and paid for. In fact, by said ordinance the company was notified that only such as should be performed with the consent and approval of the City Council was to be settled for, and all the presumptions are that it was so done, when the measurements were made by said surveyor and when he certified the same to the Administrator of Improvements, and when the latter drew his warrant therefor. But we are not left to presumptions alone. On the 17th of November, 1874, said Administrator of Improvements reported to the Council in detail what work had been done by said company and Van Norden, from the commencement until that day, and this report on the following day was adopted and approved by the Council of the defendant (R. pp. 301 to 305).

Nor is this all. From December, 1874, to the time of the sale to the city in June, 1876, H. C. Brown (a witness for defendant) was the city surveyor in charge of the drainage work, done by said parties, and while on the stand was asked and said as follows: (R. p. 458.)

Q. How was all that work that was done by the canal company and Van Norden; was it well done?

A. It was well done; there is no question about that; never has been, I think.

We, therefore, repeat this charge, like the preceding one is entirely without any foundation.

The result of the foregoing, as to said plan and the work done thereunder is this: the plan was that of the defendant, and the work done thereunder by the canal company

and Van Norden from the time she took charge in June, 1871, to the time she purchased from said company and Van Norden, in June, 1876, was well done, and in accordance with her plan, and hence her contention that she is not indebted because the plan was bad is simply ridiculous. As well might the proprietor, who has selected and adopted his plans, and employed his contractor to do the work in accordance to said plans, say to said contractor when the work is all done and strictly in accordance with said plans, "The plans—my plans—are bad, and I will not pay you for your work."

And the weight of the evidence is that the city's aforesaid plans, if completed, would have accomplished the purpose for which it was designed. See the evidence of the following witnesses on the following pages of the Record: W. H. Bell, City Surveyor, under whose supervision said plan was two-thirds ocmpleted, p. 47; Frameaux, Bell's assistant, p. 123; Collins, Administrator of Improvements, p. 51; A. C. Bell, the present City Surveyor, p. 150; Palmer, pp. 134 and 135.

The complaint of the city now is that her former plan was deficient in interior reservoir vanals. (Brown, R. p. 451; Harrod, R. p. 467). And according to Brown, to have completed the uncompleted work on the lake shore would have cost in cash $437,500, (R. p. 457) and to make the interior canals above referred to would have cost $100,000, (R. pp. 457 and 458), or a total of $537,500, and this would have made the drainage effective, yet the city abandoned it all and rendered it incomplete and ineffective.

Surely the contntion that the city could thus abondon

her own plan of drainage, never adopt another, abandon all drainage work, render the assessments against private property uncollectible, and then say there is nothing in the fund against which said warrants are drawn and I can pay you nothing, is directly in conflict with the declaration of the Supreme Court in the above case.

It may well be that the private owner could successfully urge—just as was done in the Davidson case—that his land has not yet been benefitted; that the plans to drain and benefit the same have been abandoned, and the city has deprived herself of the means with which to carry on said work of drainage by the loss and sale of the implements wherewith to accomplish said work, but surely the city herself cannot successfully plead her own derelictions in this respect, keep the property purchased with an obligation whose value depends upon her completing said work, and pay nothing.

And the above decision of Warner vs. New Orleans, 167 U. S., p. 467, is in accord with the decisions of the State of Louisiana, and of this Honorable Court on this subject.

The form of the warrants drawn against this fund is found at R. p. 109, and in substance and effect is a check drawn by the treasurer of the City of New Orleans in favor of Van Norden. It is, in all its essentials, like a check on a bank, drawn against a particular fund, and, unlike the check at common law, is an assignment of the fund to the extent of the amount on the check.

In Gordon & Gomilla vs. Mucher, 34 La. An., p. 605, this point was expressly decided, and the distinction between the civil and common law noticed. In that case there was

a triangular contest between three creditors of the defendant over a balance outstanding to the credit of his deposit account with the Union National Bank, viz.:

1. The Union National Bank claimed the credit was extinguished because it (the bank) was holder of a dishonored draft of defendant, and had applied the credit to the extinguishment of said debt.

2. The Louisiana National Bank claimed it as holder of a check of defendant on said Union National Bank for the exact amount of the credit, which check had been duly presented to said Union National Bank and payment thereof demanded, and, on refusal, had been protested, and written notice given to said Union National Bank that it was claimed to operate as an assignment of the credit.

3. Gorder & Gomilla claimed the fund by virtue of an attachment thereof after the above proceedings.

After disposing of the calim of the Union National Bank adversely to its pretensions, said, of the claim of the Louisiana National Bank as follows:

"It will not be disputed that a written order by a creditor addressed to his debtor, directing him to pay to a third person a debt due the former, accompanied by due notice to the debtor, would comply with all the requirements imposed by Civil Code. Arts. 2642 to 2654, for the valid giving of title, delivery and complete assignment of the credit or incorpereal right referred to in the order.

"On general principles the check, its presentation, protest and the written notice herein given unquestionably fulfill these requirements.

"The question presents itself: on what principle shall we

refuse to give such a transaction the effect which is given to it under the textual provisions of our Code?

"In the slightly considered case of Case vs. Henderson, 25 An., 48, it was held that the check holder did not acquire a right af action against the bank, upon the authority of the Supreme Court of the United States in Bank vs. Millard, 10 Wallace, 152. That was a case at law, in error to the Supreme Court of the District of Columbia, where the common low prevails: first, that no such privity was created by mere presentation of the check, without acceptance by the bank, because the depositors' right was a mere chose in action not assignable without the consent of the debtor.

Choses in action correspond to or, at least, are included within the civil law definition of incorporeal rights, our law differing therein from the common law distinctly cognizes the assignability of that class of incorporeal rights known at common law as choses in action, and provides for the perfectability of such assignments by notice to the debtor and independent entirely of his consent, and, from the moment of such notice, createst a privity between the debtor and the assignee, appurtaining to a perfect legal tie. It follows that the reasons underlying the common law decisions quoted have no application or existence under our law, and the decisions, therefore, have no application as authority here.

"In a very recent case decided by Justice Miller on circuit it was held that a check, duly notified to the bank, constituted an assignment of the fund drawn against which a Court of Equity will enforce in favor of the check holder, although a Court of law will not. Bank vs. Coates,

12 Reporter, 514. Even had the check in the instant case been drawn in a common-law State upon a bank in such State, so that the rights of the check holder would have been regulated by *lex loci contractus*, yet if the action thereon had, by any means, been brought in our forum, our Courts would have looked to, and have enforced the equitable rights of the check holder, and would have maintained the assignment. Jackson vs. Tiernan, 15 La., 485. Here the check and notice operate, not merely as equitable, but equally, a perfect legal assignment."

All that was necessary to complete the assignment of the drainage tax to the amount represented by the respective warrants given in discharge of the purchase price was notice to the debtor, and this notice was given, in case of each warrant, assignment or transfer, when such warrant, transfer or assignment was presented for payment, and, not being paid, the fact and date of presentation was endorsed thereon by the Administrator of Finance. See form of warrant (R. p. 109).

Even under the common law, these drainage warrants, being orders or checks drawn against a particular fund, specially appropriated to their payment, the Court of Great Britain would hold they were an assignment of that fund. Citizens'Bank of La. vs. First. Nat. Bank, Law Reports, 6; House of Lords, 352; English Reports, 7; Moak, 36.

These drainage warrants, being an assignment of the drainage tax, the question is, where is the warranty? Under the title of the Civil Code relating to the "Assignment or

Transfer of Civil Credits and Other Incorporeal Rights," Art. 2646 says:

"He who sells a redit or an incorporeal right warrants its existence at the time of the transfer, although no warrant be mentioned in the deed."

The warranty exists though no warranty be expressed in the instrument of transfer. Foley vs. Swayne, 2 An., 880. Even in case of stipulation of no warranty, as "an assignment without any recourse or claim whatsoever against the vendor," the seller in case of eviction, is liable for the restitution of the price, unless the buyer was aware, at the time of the transfer, of the danger of eviction—that is, was aware that any realization on the transfer was a mere matter of hazard and chance—and purchased at his peril and risk. Civil Code 2505 provides as follows:

"Even in case of stipulation of no warranty, the seller, in a case of eviction, is liable to a restitution of the price, unless the buyer was aware, at the time of the sale, of the danger of eviction and purchased at his peril and risk."

See also Corcoran vs. Riddle, 7 An., 268; Jenkins vs. the Parish of Caddo, 7 An., 559; Johnson & Co. vs. Boise & Frelson, 40 An., 273. In the latter case it was decided that when tranferrer of a judgment sells all his rights to it, and to a suit growing out of it, he warrants the existence of the debt at the time of the transfer, and that if the debt had been extinguished and was not in existence at the time of the sale—the very defense which the bill charges the defendant will set up here—the vendor is bound for the price. That is, if the restitution or satisfaction can be paid in money, and if not, the parties are remitted to the gen-

eral law regulating the Courts of Justice in the affirmance of contracts. Article 1937 of the Civil Code states it as follows:

"In ordinary cases, the breach of such a contract entitles the party aggrieved only to damages, but where this would be on inadequate ompensation, and the party has the power of performing the contract, he may be constrained to a specific performance by means prescribed in the laws which regulate the practice of the Courts."

As was shown in Lavine vs. Mitchell, 35 An., p. 1121, this is in accord with the equity jurisprudence on this subject. See cases there cited, and especially sections 717 and 718 Stoy's Eq. In fact the warranty in like cases has been enforced by the Supreme Court of Louisiana against this defendant. In the case of Tournier vs. Municipality Number One, 5 An., 298, the court stated the facts of the case and decided in favor of said warranty as follows:

"The plaintiff claims from the defendant the sum of $3682.40 for work done and materials furnished under two certain contracts made by the municipality with Hubert Girard, for the making and laying of flatboat gunwale banquettes in the suburb Treme. By these contracts the municipality was to pay one-third of the price agreed upon, and two-thirds were to be paid by the owners of property in front of which the banquettes were to be made. The municipality paid its third, but it is alleged that the plaintiff has not been able to collect the whole of the remaining two-thirds from the property holders, from causes for which the muncipality is responsible. This suit is for the amount which the defendant has been unable to recover. The plain-

tiff had judgment in the court below and the defendant has appealed.

"It having bee determined by a court of competent jurisdiction in the last resort that the plaintiff could recover one-third of the cost of the work from the owners of property, instead of two-thirds, as was stipulated in the contract between the parties, it seems to us necessarily to follow that the plaintiff has a claim on the municipality for the deficiency. The contrator agreed to take, as the price of his work and material, the debt of the adjacent property owners for two-thirds, looking directly to the municipality for the one-third. The municipality warranted to the contractor the existence of the debt, or recompense against the property owners for two-thirds of the cost. This debt having been determined not to be due, the warranty is falsified, and the municipality is bound by it."

And the same principle was decided in Cronin vs. Municipality No. One, 5 An., page 537, where the head note is as follows:

"Where the Municipality Number One contracts with a paver, that he shall be paid a portion of the price by the proprietors of the property fronting on the pavement, and these proprietors refuse or neglect to make the payment, the Municipality is bound for the amount stipulated to be paid by the contract."

Another case, directly in point, on the question of implied warranty, is the late case of Meyer vs. Richards, 163 U. S., p. 385. In that case, as in this, the parties thought they were dealing with matter having a real existence; in that case, that the bonds had an existence, and in this case

that the drainage taxes—especially those due by the City of New Orleans—all levied, and the rolls homologated by the Courts, had an existence, had not been extinguished, and were available for the payment for the purchase warrants. In fact, the very existence of the taxes at the time of the sale, and their availability for the payment of the purchase warrants was the very consideration for the sale. The Court, after stating the law of Louisiana on the question of implied warranty and quoting the Civil Code and citing the case of Knight vs. Lanfear, 7 Rob., 172, and Pugh vs. Moore, Hymes & Co., 44 An., 209 (wherein was sought the recovery of the price paid for the purchase of unconstitutional bonds), said:

"The Supreme Court of Louisiana, after elaborate consideration, held, among other reasons, that the seller having been obligated to the warranty of the existence of the bonds at the time of the sale, and the bonds being void under the Constitution, he was obliged to return the price."

And after stating the above law was drawn from the Code Napoleon, and from the Roman law, and that under the authorities of that Court, when the provisions of the Louisiana Code and the Code Napoleon are identical, the expositions of the civil law writers, and the adjudications of the French Courts as to the proper construction of the Louisiana Code, were persuasive, quoting from the French Commentators as following, beginning at page 400:

"Marcady, in his commentary on the law of sale, thus states the rule:

"'All sales of a credit subject the seller, unless there be a stipulation to the contrary, to a guarantee of the existence

and validity of the credit, as also his right of ownership to it. Article 1693 speakes, it is true, only of the guarantee of the existence of the credit, but as the credit existing to-day, if subsequently declared to have been void, would in contemplation of the law have never existed, and also as it would be equally immaterial for the buyer if the credit had a real existence, if that existence was available only to some one else, it is evident that by an existing credit is to be understood one which validly exists, as the property of him who transfers it. One who transfers, then, is held to guarantee in three cases: (1) If at the time of the sale the credit did not exist, either because it had never existed or because it was extinguished by compensation, by prescription or otherwise. (2) If the credit should be declared to have been void, or the obligation be rescinded. (3) If it belonged to another person than the transferrer. Marcade, De la Vente, 335.'

"Troplong, in his learned treatise on the same subject, thus expounds the doctrine:

" 'In the sale of a credit, as in that of every other object, legal warranty is always understood. The vendor guarantees to the vendee the existence of the credit at the moment of the transfer although there be no expression in the contract to that effect. It is this which caused Ulpian to say: "When a credit is sold, Celsus writes in the ninth book of the Digest, that the seller is not obliged to guarantee that the debtor is solvent but only that he really is a debtor, unless there has been an express agreement between the parties on the subject." This guarantee is more strictly obligatory in the sale of a credit than in other matters,

because the right to a credit is either visible or palpable, as it is in the case of other movable or immovable property. * * * And here let there be no misunderstanding. Do not confound the credit with the title by which it is established. Both law and reason exact that the credit should exist at the time of the sale, and it is not sufficient that a title should have been delivered to the buyer. The title is not the credit. It can materially subsist, while the credit is extinguished. Thus, if the credit had been annihilated by compensation or by prescription it would serve no purpose to deliver to the buyer a title which would have nothing but the appearance of life. The buyer in such case would have a right to avail himself of the warranty. (Troplong, De la Vente, 931, 932.)'

"And Laurent, the latest and fullest commentator, says:

"'Art. 1693,' that 'the seller guarantees the existence of the credit.' We understand this word 'existence' in the sense given to it by tradition. 'Whoever,' says Loyseau, 'sells a debt or rent, guarantees that it is due and lawfully constituted, because, without distinction in all contracts of sale, the seller is bound to three things by the very nature of the contract: (1) that the thing exists; (2) that it belongs to him, and (3) that it had not been engaged to another.' Pothier resumes this distinction by saying 'that the guarantee of a right consists in the undertaking that the right sold is really due to the vendor'; and the Code is yet more brief, since it speaks only of the existence of the debt. We must, therefore, see what the existence of the debt signifies according to the explanation of Loyseau. Firstly, the vendor is held to guarantee that the debt exists

and subsists (*soit et subsisto*). If the debt had never existed beause one of the condition necessary for the existence of the contract makes default, the vendor has sold nothing; there is no subject; he is held to the guarantee; this is obvious. The same rule would apply, if the debt had existed, but was extinguished at the time of the transfer, because it is as if it had never existed. Such would be the case of a credit which was prescribed, or which had been extinguished by compensation. * * * It is necessary, in the second place, that the credit should be as constituted, says Louseau. If it is stricken with a vice which renders it void, the vendee has a right to the warranty. This is not doubtful, since the right is really annulled or rescinded, because, the judgment annulled, the credit destroys it as if it never existed.' (Laurent, Vol. 24, Nos. 540, 541, 542."

And the Court then said:

"The views thus expressed by the foregoing writers are substantially concurred in by the French commentators. Duranton, Vol. 9, p. 183; Aubrey & Rau, Vol. 5, p. 442. The Courts of France from an early day have applied the same principle."

The Court then gives two French decisions, as follows:

"In Prat vs. Dervieux the facts were these: Dervieux transferred the amount of a claim against the gomernment, which by a subsequent liquidation of accounts was compensated by a claim held by the government which resulted from another matter. The Court of Cessation held that, under Art. 1693 of C. N., the obligation to guarantee the existence of the claim at the time of the sale compelled the seller to restore the price. Journal due Palais, p. 311.

"In Revel vs. Lippman a transfer was made of a claim against the government, which was stated to be subject to a future settlement of accounts. On the ultimate liquidation it was found that nothing was due, and the Court of Cassation held that the obligation, therefore, arose to return the price paid on the sale. Journal du Palais 1625, p. 963."

In the case of Semel vs. Gould, 12 An., 225, it appears that the police jury of the Parish of Point Coupee contracted with the plaintiff for the building of a levee upon certain specific lands, it being specially stipulated that the contractor should look for payment exclusively to the lien given by law on the land for the cost of the work. But when the contractor attempted to enforce the lien for the amount due him, it appeared that the land belonged to the United States and was not liable. The contractor, therefore, sued the police jury and recovered judgment, in affirming which the Supreme Court said that:

"In making the contract for building the levee there was an implied warranty on the part of the police jury that the land on which the work was to be done belonged to a person whose property could be reached by their ordinances to defray the expenses of such work."

This case was cited in Cole vs. Shreveport, 41 A., 841, where it appears the plaintiff contracted to do certain paving, the cost of which, by an act of the legislature under which the work was supposed to be authorized, was to be done, two-thirds by the owners of the property, and one-third by the city. By a stipulation in the contract the plaintiff was to receive in payment of the city's share certain wharfage dues. After the work was done the Courts

decided that the property holders were not liable, and that the collection of wharfage dues was unlawful. These sources of payment having failed, suit was brought against the city for the price of the work. Upon appeal from a judgment in favor of the plaintiff it was contended that, having contracted to accept the wharf dues in satisfaction of his work, the plaintiff must be satisfied with the "pound of flesh" and had no recourse against the city upon the failure of the tax, but the Court refused to adopt this view of the rights of the contractor, remarking in the course of its opinion (p. 845):

"Jurisprudence has settled that, notwithstanding a stipulation specially excluding any recourse on the city, a contractor who had done useful works, and whose payment failed by reason of subsequent events which had diverted the revenues applied to his claim, could recover against the city with which he had contracted.

"That was the treatment applied by the Supreme Court of the United States in the case of Hitchcock vs. Galveston, 96 U. S., 341.

"The principle which underlies our conclusions in this controversy is so well and clearly expounded by the exalted tribunal that we are induced to make the following extracts from their decision:

" 'They, plaintiffs, are not suing upon the bonds, and it is not necessary to their success that they should assert the validity of those instruments. It is enough for them that the city had power to enter into a contract for the improvement of the sidewalks; that such a contract was made with them; that under it they had proceeded to furnish materials

and do work, as well as to assume liabilities; that the city has received and now enjoys the benefit of what they have done and furnished; that for those things the city promised to pay, and that, after having received the benefit of the contract, the city has broken it. It matters not that the promise was to pay in a manner not authorized by law. If payments cannot be made in bonds because their issue is *ultra vires*, it would be sanctioning rank injustice to hold that payment need not be made at all. Such is not the law. The contract between the parties is in force, so far as it is lawful.'"

This case of Hitchcock vs. Galveston was cited in the late case of the District of Columbia vs. Lyon, 161 U. S., p. 200. In this latter case the city and District of Columbia issued and sold certificates to raise funds to defray the cost of paving, which were payable out of special taxes to be assessed upon the property bordering on the line of the improvement. The work was done by the contractor, but the taxes could not be collected on account of a failure to make lawful assessments. To a suit on the certificates the District of Columbia pleaded that it was not liable, contending that the contractor had agreed to look solely to the special taxes for payment. The Supreme Court of the United States, in affirming the decree of the Supreme Court of the District, maintaining the validity of the certificates, held that the effect of the law:

"Was to charge the municipality, not with direct indebtedness for the work done under its ordinance, but with a duty to work out a payment thereof by seeing to it that

the cost should be charged as a lien and collecting the special tax from the lot owners."

And a failure to perform this duty made the district liable.

And the city's express warranties contained in the bill of sale under which the warrants sued on were issued (R. p. 102) are equally conclusive against her. Her agreement not to obstruct or impede, but, on the contrary, to facilitate by all lawful means the collection of the drainage taxes until the warrants were fully paid, and apply said collections solely to the payment of said warrants, is an express warranty, as strong as human language can make it, that there was a tax to pay said warrants, and that the same was available for that purpose. Any other construction would make said covenant a meaningless affair.

And upon these warranties, implied and expressed, Van Norden relied when he sold his property and accepted the drainage warrants in question therefor. This most clearly appears from the evidence of Van Norden (R. p. 247), and from the evidence of E. C. Palmer, (R. p. 251) who had loaned Van Norden large amounts of money to carry on his drainage work and was familiar with Van Norden's affairs. This evidence is uncontradicted.

And the evidence of said Van Norden further shows that the city officials assured him that the city would go on and complete the drainage work, and that their desire for getting the plant and franchise was that they could do said work cheaper than the price paid to him (p. 248). And the consequence of such representations thus relied upon thus stated by the Supreme Court of the United States Dickerson vs. Colgove, 100 U. S., page 320:

"The law on this subject is well settled. The vital principle is, that he who by his language or conduct induces another to do what he would not otherwise have done, shall not subject such person to loss or injury. Such change of position is strictly forbidden. It involves fraud and falsehood and the law forbids both."

III.

As to the validity of the assessment on streets, squares and other public property duly reduced to judgment by Courts of competent jurisdiction,

1st. We think the validity of these assessments has already been passed upon in this Hon. Court. The assessment against the City of New Orleans are alleged in the 11th paragraph of the bill (p. 10 of the record) to be as follows: 1st District, $223,110.60; 2nd District, $190,885.47; 3rd District, $207,441.46; 4th District, $65,956.77; and the homologation of said assessments—that is, their reduction to judgment—are set out in the 10th section of said bill, while the proceedings of said homologations and the detailed items of assessments making up the above amounts, are given in the exhibits filed with and made part of said bill, as follows: 1st District, pp. 21 to 45, and the detail of the items making up said sum in said district, pp. 37 to 45; 2nd District, Parish of Jefferson, pp. 46 to 57, and detail of the items, making up the portion of said amount in said parish, pp. 51 to 52; 2nd District, Parish of Orleans, pp. 58 to 70, and detail of the items, making up the portion of said amount in the Parish of Orleans, pp. 63 to 65: 3rd District, 70 to 80, and detail of the items, making

up said amount, pp. 75 to 76; 4th District, pp. 80 to 91, with detail of the items, making up said amount in said district, p. 90.

To the bill averring the above assessments on streets and squares there was, as already stated, a general and special demurrer, and after the Circuit Court had dismissed said bill and an appeal had been taken from its decree to said Circuit Court of Appeals, this precise question of the validity of said assessments was fully argued before, and submitted to that Court, and upon the basis, and solely upon the basis that said assessments and the judgments based thereon were valid, that Court submitted this question—which is its vitals carries said validity—to-wit: "Is the City of New Orleans * * * * estopped from pleading against the Complainant the issuance of bonds, * * * to retire drainage warrants * * * as a discharge * * * from her own liability to that fund as assessee of the streets and squares?"—not an imagined or supposed obligation, but a real, actual, and subsisting obligation as assessee of said streets and squares. These assessments on said streets and squares and the judgments of Court thereon being alleged in the bill, set out in detail in the exhibits thereto attached and made part thereof, the Court of Appeals must necessarily have found they were valid and imposed liability before it propounded said question to the Supreme Court. If this is not the fact then said Court of Appeals was only experimenting with this Honorable Court and submitted to it a moot question, and was making this august tribunal but a moot court, and, as such, it decided only a moot case. Surely this was not and could not be the case. The lan-

guage of the Supreme Court of the United States in Bissel vs. Spring Valley Township would instantly reject such an idea, where at the bottom of page 232 it said:

"Courts are not established to determine what the law might be upon possible facts, but to adjudge the rights of parties upon existing facts; and when their jurisdiction is invoked, parties will be presumed to represent in their pleadings the actual, and not supposable, facts touching the matters in controversy."

The affirmative answer to the above question is a declaration of the existence and validity of the assessments levied for a local improvement, from which the city was not discharged by the bond issue, and if not then the Court—as above stated—merely decided a moot case and without any consideration of the vilidity of the assessments on which said question was based.

And here we beg to observe, that the opinion of the Circuit Court, Peake vs. New Orleans, 38 Fed. Rep., p. 781, relied upon by defendant, instead of being a declaration of the invalidity of the assessments on the streets and squares, is an unwilling admission of their liability as declared by the highest Court of the State and the Legislature of the State.

2d. But suppose we are mistaken in the above and that the city's liability on the judgments of the State Courts based on the assessments on the streets and squares has not been already decided, or at least, recognized by this Court, then we say that question cannot now be entered into for various reasons, and among them as follows:

(a). There is no longer any assessment, but the same

has been merged into a judgment, just the same as promissory notes cease to exist, or have any force from the moment they are reduced to judgment, Oakey vs. Murphy, 1 An., p. 372; Denniston vs. Payne, 7 An., 334. In W. Feliciana R. R. Co. vs. Thornton, 12 An., p. 738, the Court said:

"The promissory note which the plaintiff sued upon in Mississippi has no longer a legal existence; it is merged in the judgment, and it can only be severed from it by the reversal or recision of that judgment. Abat vs. Buisson, 9 La., 418; Oakey vs. Murphy, 1 An., 372; Small vs. Creditors, 3 An., 386; Denniston vs. Payne, 7 An., 333.

(b) The assessments on the streets and squares being reduced to judgment by the State Court, but two questions are open for inquiry, viz.: jurisdiction, and day in Court. Christmas vs. Russel, 5 Wall, 305; Thompson vs. Whitman, 19 Wall, 457; Renaud vs. Abbott, 116 U. S. A., p. 277.

In Mills vs. Duryea, 7 Cranch, p. 481, it was expressly held "*nil debit* is not a good plea to an action founded on a judgment of another State." Surely this is conclusive of the matter here conteded for. And that the Court had jurisdiction and the city day in Court, the copies of the proceedings from the State Court show said proceedings were had in the Courts designated by the statutes of the State. And especially did the city have a day in Court for the judgment of homologation in the Third and Fourth drainage districts for the whole amount, and for the nine instalments of the assessment in the First District was rendered at the suit of the city herself, (R. pp. 72 to 88).

In the case of the United States vs. New Orleans, 98 U.

S., p .381, there had been a judgment rendered against the city on certain bonds, and a petition for a mandamus was filed to compel the payments thereof, and various objections were raised to the legality of said bonds, and it was contended their payment was confined to a certain fund, but the Court, at page 395, said:

"In the present case, the indebtedness of the City of New Orleans is conclusively established by the judgments recovered. The validity of the bonds upon which they were rendered is not now open to question. Nor is the payment of the judgments restricted to any species of property revennes, or subject to any conditions. The indebtedness is absolute. If there were any question originally as to a limitation of the means by which the bonds were to be paid, it is cut off from consideation now by the judgments. If a limitation existed, it should have been insisted upon when the suits on the bonds were pending, and continued in the judgments. The fact that none is thus contained is conclusive on this application that none existed."

And a judgment rendered upon an assessment for taxes is just as conclusive as a judgment rendered upon any other cause of action, and cannot be attacked collaterally. In Driggers vs. Cassady, 71 Ala., page 533, the Court said:

"It is no objection to the application of this principle that the present is a proceeding to enforce the collection of delinquent taxes. While great accuracy is exacted in all such proceedings, and strict rules are applied for the protection of the taxpayer, this principle, forbidding the callateral assailment of judgments, has often been successfully invoked in actions of this nature. It has accordingly

been decided that there is no sound reason why judicial proceedings for the enforcement of taxes should be exempt from its influence. Burroughs on Tax, 285-6; Freeman on Judg., Sec. 135; Wellshear vs. Kelley, 69 Mo., 343; Ethel vs. Foote, 39 Cal., 439."

In Cadmus vs. Jackson, 52 Pa. State, page 295, there had been a judgment for taxes which had been paid before any lien was entered for them, yet the Court held that after judgment had been entered for said taxes, said judgment could not be attached collaterally, and, at page 305, said:

"It is answered, in the first place, that the taxes were paid before the lien was entered for them, and that all judicial process founded upon paid taxes was null. This answer cannot prevail, because there is the judgment for the taxes in full force, and it cannot be collaterally impeached."

Free on Judgments, Sec. 135, said:

"Jurisdiction being obtained over the person and over the subject matter, no error in its exercise can make the judgment void. The authority to decide being shown, it cannot be divested by being improperly or incorrectly employed. Error of decision may be corrected, but not so as to reach those who have in good faith relied upon its correctness. The same rules apply to actions to recover delinquent taxes as in other cases, in respect to collateral attacks. It cannot be shown, to avoid the effect of such judgments, that the taxes were previously paid. Neither will such judgments be any the less effective because it appears from the judgment roll that the assessment was illegal and void."

In the case of Mayo vs. Foley, 40 California, p. 281, there had been a decree based on an assessment which on its face was void, and under such decree a sale had been made and the property was purchased by the plaintiff, who brought the above action to recover possession of property purchased. The Judgment was for the defendant and an appeal was taken and to the Appelate Court where the appellee contended that inasmuch as the tax decree showed it was based on a void assessment the sale thereunder was also void, but the Court decided otherwise and gave a new trial, and, at page 282, said:

"To establish title in himself to the demanded premises the plaintiff offered in evidence at the trial certain judicial records, by which it appeared that the people regularly instituted an action against the defendant, Foley, and also the demanded premises themselves, for the recovery of certain delinquent taxes, and that Foley and the real estate were regularly served with process in the action; that a general default was made, and it was by the Court, thereupon, adjudged and determined that the allegel taxes had been duly and properly assessed, and were delinquent; and th premises were directed to be sold by the Sheriff of Sacramento County to satisfy the judgment and costs. The sale was made by the Sheriff in substantial pursuance of the decree, and the plaintiff became the purchaser at the sale, and ultimately received the Sheriff's deed for the premises.

"These records were, however, excluded by the Court below, upon the objection made by the defendant that it appeared therefrom that the original assessment was void,

and because the decree itself was void, in that it directed the several lots to be sold together for the aggregate amount of taxes upon all of them, instead of directing each lot to be separately sold for the tax due upon each.

"The Court below erred in excluding the evidence upon that ground.

"If the sale had been, in fact, made upon an alleged assessment for taxes and a subsequent delinquency in their payment, the purchaser at such sale would have been bound to maintain the legal validity of the assessment in the first instance, and of all the proceedings thereafter had, through which he claimed to have derived title to the premises. But the sale here was had pursuant to a decree of a Court of competent jurihdiction, entered in due form of law, and after the requisite service of process had been made. It is true that the decree itself was entered because of the alleged delinquency in the payment of the tax, to the regularity in the levy, of which objection is now sought to be made. But the legality of the assessment in the first instance, and the fact of the delinquency in its payment, were the very questions made in the suit which resulted in the decree itself, and it was directly determined and adjudged therein that these taxes were legally levied and were due and unpaid.

"This is onclusive alike upon Foley and the premises, of the truth of the matters so adjudged, until the decree shall be in some way reversed or set aside by direct proceedings had for that purpose.

"That no mere collateral inquiry upon this point can be allowed, however, is too well settled to require argument

or illustration to maintain. The purchaser of real estate at a sheriff's sale, in order to establish in himself such title as the defendant in execution had, is only held to show a judgment of a Court of competent jurisdiction (no matter if it be erroneous on its face), valid process issued to the sheriff therein, and a sheriff's deed made upon a sale thereunder."

And this case was affirmed and followed in the like case on Anderson vs. Rider, 46 Cal. 134.

And the law of Louisiana as to the conclusiveness of a judgment rendered by a Court of competent jurisdiction, after due notice, is the same. In the Succession of Quin, 30 An., p. 947, it was held:

"A judgment rendered by a Court of competent jurisdiction, and where parties have been duly cited, cannot be attacked in any collateral way, even by third persons not parties to it."

In Starns, et al., vs. Handot, et als., 42 An. 366, it was decided:

"A judgment rendered by a Court of competent jurisdiction, where the proper parties have been cited, must have full force and effect until set aside by direct action. It cannot be attacked collaterally."

This was clearly recognized by the plaintiff in Davidson vs. New Orleans, 34 An., p. 170, where she brought her direct action to have the drainage judgments as to her property rendered in operative.

But in the First District, for nine instalments of the assessment on streets and squares ($233,111.60), and in the Third District, for the full assessment on said streets

and squares ($207,471.46), and in the Fourth District, for full assessment on said streets and squares ($65,956.75), the judgment of homologation of the said assessments were rendered at the request of the city herself, and were, therefore, confessions of liability on such assessments on said streets and squares.

Such a judgment cannot be set aside for nullity by a party confessing its liability. Kilgore vs. Nicholson, 26 An., 633.

And the decree of homologation of said assessments in said First District was rendered by the Supreme Court of Louisiana, 27 An., p. 20, (Record, p. 28) and was afterwards affirmed by the Supreme Court of the United States; 96 U. S. R., p. 97, where it was declared the judicial proceedings therein had in the Courts of Louisiana did not deprive the assessees of their property without due process of law.

And there can be no doubt that the homologation of the assessment roll at the request of the city was a final and executory judgment against her. See Capdeville vs. Irwin, 13 An., p. 286.

3d. But suppose we are still mistaken in that this Court has recognized and passed upon said liability of defendant on the assessments on the streets and squares reduced to judgment, that the defendant has the right to attack said judgments of homologation collaterally, then we say that under the statutes and the settled jurisprudence of Louisiana said assessments were and are legal.

The statutes of 1858 required the commissioners to make a plan of their respective districts, designating the limits

thereof, the subdivision of the property therein contained and the names of the proprietors." Sec. 7, p. 3, of Statutes. And the Court was required by the same section to decree "that such portion of the property situated within said limits is subject to a first mortgage lien," etc.

By section 8 of the same statute each board was authorized and empowered to levy a "uniform assessment or assessments upon the superficial or square feet of lands situate within the draining section or district of such board." (Stat. p. 4.)

Similar language is also contained in section 2 of the law of 1859 (Stat. p. 6) which provides for an assessment to pay bonds which might be issued by the Drainage Commissioners, and in section 5 of the same act (Stat. p. 7), providing the manner in which money should be raised to maintain the drainage work after completion.

In the law of 1861 (Stat. p. 8), where provision is made for judgments to be entered against lands assessed and the owners thereof, "assessments made upon property within the limits" of certain territory is spoken of and the "names of the owners thereof" is required to be given. There is not a hint anywhere in these statutes that public property is to be exempted from assessment. All the property within the limits of the drainage district is to bear the burden of the assessments. And evidence is furnished that the public property and streets and highways were to be included by the language contained in section 8 of the act of 1859. (Stat. pp. 7 and 8.)

It is therein provided that the Boards of Commissioners shall at all times have access to any plans or parts of plans

of the City of New Orleans and Parish of Jefferson, "the same to include the street or streets, road or highway of any portion or section thereof to be drained, according to the provisions of this act and the acts to which this act is amendatory."

When we consider that these boards of commissioners were to make the assessments, the inference is strong that these plans, including streets and roads, were to be used to aid them in their duty of assessing said streets and roads.

And an assessment upon the streets and public property under the old drainage law of 1835 was declared legal by the Supreme Court of Louisiana in New Orleans Draining Company, praying for the confirmation of a tableau, 11 An., page 338, where at page 337 the Court said:

"While we feel the almost impossibility of doing justice among so many persons with conflicting interests, we are satisfied that whether we adopt the area or the value of the lots as the plan upon which the assessments is to be made, it will approximate the right so nearly that less injustice and injury will be done, by adopting either, than by sending the case back for prolonged litigation and further proof upon this question.

"The principle that it costs as much to drain one foot of land of little value as it does to drain an equal area of more value, and that were alike both benefited, prevailed as to the land below the ordinary level of high water in the lower coast. This seems to be recognized by the third section of the Act of 1839 which directed the appraisers in

making the distinction to take into consideration the extent of the individual properties.

"The large proportion of the expense which by this view is thrown upon the city for these streets, meets in some measure that equity which has been urged upon our consideration, that as the work has been undertaken for the public good the public ought to bear the charge of it, notwithstanding the benefit to the owners of the soil."

In Marques vs. The City of New Orleans, 13 An., p. 319, the Court expressly held the City was owner of Claiborne Street (middle of neutral ground), and as such owner liable to pay for paving or shelling the street, just as the private owner on the opposite of said street was liable. The case is stated by the Court as follows:

"Plaintiff contracted with the City of New Orleans to level, grade and shell a tract twenty feet wide on Claiborne Street, on the north side of the middle ground of premenade of said street, from St. Bernard Avenue to the Elysian Fields Street, in the Third District, of the City, at the rate of $2.46 per running foot.

* * * * * *

"In the case at bar, as the city owns on one front, if she were not liable, then only one-half of Claiborne street and of streets similarly situated could be paved.

"The city is obliged to make and pay for one-half of the paving in the case at bar, not only from the effect of section 119 of the city charter, but also because the middle ground in Claiborne street is the property of the city and intended or dedicated as a public promenade and for the public good and enjoyment. It is then just when the

city has property of this character, that she should pay her proportion of expenses necessary for the construction of a public highway along the border of her property, and not coerce opposite proprietors to pay the whole, and thus tax them in particular to enable the community to enjoy a pleasant promenade and free circulation of air."

In this case Justice Spofford dissented from the reasoning of the Court, and said that in his opinion the city was not owner of the middle ground of Claiborne street, and that the same was a "public thing" and exempt from assessment, but concurred in the decree of the court on the ground that the city was liable on her implied warranty, under the authority by him cited, which is noticed under the head of estoppel and warranty.

In this case it is, therefore, clear that it was directly decided, and against the opinion of Justice Spofford, and the doctrine here contended for by the defendant that the City of New Orleans could be legally assessed on public property for a local improvement.

This case was directly followed in Correjolles vs. Succession of Foucher, 26 An., p. 362, where the Court at page 363 said:

"It seems that the only question in which the defendant is concerned, presented in this case, was decided in the case of Marquez vs. The City of New Orleans, 13 An. 320. In that case the Court held that the middle ground of Claiborne street belonged to the city as a *locus publicus*, and that the city was bound for one-half the expense of constructing a road on the north side of Claiborne street, the entire expense of which it was sought to impose upon the

proprietors on the north side. That case and the one at bar seem identical. With that view of the case the judge *a quo* decided in favor of the defendant, and we think correctly.

Both the above cases were examined and approved in Asphalt Paving Co. vs. Gogreve, 41 An., pages 259 and 260.

Besides, Act 30 of the law of 1871 expressly "confirmed" the assessments, as shown by the books of the first, second and third drainage districts, under the Acts of March 18, 1858, that of March 17, 1859, and the several supplementary and amendatory thereto." (Stat. Sec. 9, p .12.)

In the proceedings to homologate the assessment in the first district for the first instalment thereof, the proceedings were carried on at the instance of the original drainage commissioners, before they were succeeded by the Board of Administrators of the City of New Orleans, and the city appeared and appealed from judgment of homolo- quiesced in the judgment. (R. pp. 24, 37 to 41 and 266 to 269.)

No other opposition was ever made by the city to the entry of these judgments against her. On the contrary, judgment upon all except said first instalment in said First District, and upon the entire assessment in the Second District, both in the Parish of Orleans and Jefferson, that is, upon nine instalments in the First, and upon all assessments in the Third and Fourth districts, were rendered upon the application of the city herself.

And when, as a matter of precaution, it was thought desirable to revive said judgments of homologation (for it

was in fact not necessary to revive them), because the statute under which they were levied (Stat. page 4, latter part of Sec. 7), declared they "should attach to said property until the amount assessed and the interest thereon shall have been paid in full," the city herself went into Court and filed necessary proceedings (which are still pending), and prayed for their revival, thus judicially admitting their validity without exception or qualification. (R. pp. 54 to 57; 67 to 68; 78 to 80.)

The effect to be given to the judicial declaration of a party, and even to those of the State, has been the subject of frequent investigation and decision in the courts of Louisiana. In Folger vs. Palmer, 35 An., p. 744, the Court said:

"Our jurisprudence has uniformly recognized and enforced the wise and salutary doctrine, which firmly binds a party to his judicial declarations, and forbids him from subsequently contradicting his statements thus made. (Farrar vs. Stacy, 2 An., 211; Gridly vs. Connor, 4 An. 416; Dunham vs. Williams, 32 An. 962; Gilmore vs. O'Neil, 32 An. 979; Dickson vs. Dickson, 33 An. 1370). The doctrine is so firmly sanctioned by both reason and justice that our courts have unhesitatingly extended it to the State itself. State vs. Taylor, 28 An. 460; State ex rel. Morgan, 28 An. 121; State vs. Ober, 34 An. 360."

In the State of Louisiana vs. Ober, 34 An., p. 361, the Court said:

"There is no question that were the original vendor a private individual, it would be precluded by such action from again claiming the land, and instituting suit for its recovery, on account of defects or irregularities attending

the proceedings under which he had first sold the property. He could not and would not, under such circumstances, be listened to. Plaintiff's counsel contends that this rule does not apply to the State, and es pecially as the bene does not apply to the State, and especially as the bene an interest in the lands embraced therein.

"We think otherwise. In the case of the State vs. Taylor, 28 An. 462, it was held: 'That the State is bound by her pudicial pleadings and admissions the same as private persons, and is entitled to no greater right or immunity as a litigant than they are. Nor is this rule of law varied by the fact that there are others interested in the subject matter of the proceedings conducted by the State. If any persons have been injured by the action of the Stat, good faith and a sense of justice should incline the State to make reparation as all other fiduciaries should do under like circumstances, even admitting their existence; but such conditions cannot effect the rules of law nor modify the liability and status of the State in a judicial proceeding in a suit where the State seeks to recover the lands as owner, and where the legal title under the Federal grant was vested solely in the State."

The matter of local assessments has been the subject of judicial inquiry and decision in other States. In the ase of County of Mc Lean vs. City of Bloomington, 106 Ill., page 209, all the objections here raised were there considered and decided, and said objections and their decision are so clearly stated and answered that we cannot do better than quote the language of the court, beginning at page 213, where the court said as follows:

"The objections may be included under three heads: First, the property is exempt from special assessments;

second, the statute under which the city is proceeding does not authorize any assessment against property of the county; third, the judgment cannot be enforced by sale of the property, and not other mode of enforcing the payment of such judgment can be resorted to.

"It is not claimed the first objection has the direct sanction of the statute in its support, but the contention is, such property is expressly exempt from taxation, and special assessments are included within the meaning of the word taxation. We have been too long and too firmly committed to the doctrine that exemption from taxation does not exempt from special assessments, to now admit that it is even debtable. Trustee, et al., vs. City of Chicago, 12 Ill., 403; Higgins vs. City of Chicago, 18 id. 276; City of Chicago vs. Colby, 20 id. 614; City of Peoria vs. Kidder, 26 id., 352; Wright vs. City of Chicago, 46 id. 44; Nix. v. Post. id. 121. The distinction between taxation and special assessment is, also, clearly made in our present Constitution, (secs. 1-5, 9, art. 9,) and while providing that the General Assembly may exempt the property of the State, counties and municipal corporation from the former, (section 3, supra.), makes no such provision in regard to the latter, but on the contrary, by section 9, supra., authorizes the General Assembly to vest the corporate authorities of cities, towns and villages with power to make local improvements by special assessments,' without any restriction as to the property to be assessed.

"The second objection rests entirely upon the assumption that to include the property of the counties it should be expressly named—that language, however comprehensive, in general terms only, is not sufficient. The rule held by this court is directly the reverse of this assumption. The

exemption, not the inclusion, must specifically appear. General language, like that under which the city is proceeding, includes the property of counties, cities, etc., as well as private property. Higgins vs. City of Chicago, supra; Scammon vs. City of Chicago, 42 Ill., 192; Cook County vs. City of Chicago, 103 id. 646.

"There is not the slightest analogy between Fagan vs. City of Chicago, 84 Ill., 227, and the People vs. United States of America, 93 id., 30, cited by counsel for appellant. There the question related to the right of one sovereignty to invade another. The relation between the cities and villages and counties is totally unlike that between the government of the State and the general government of the United States. Cities, villages and countries are mere agencies of the State, by and through which to conveniently administer local government. In the absence of express constitutional restraint the General Assembly might abolish them, one or all, and substitute other and entirely different agencies in their stead. We have repeatedly held that, though the fee of streets is in the city, she has no private property in them, but holds them in trust for the use of the public—not the citizens of the city alone, but the entire public, of which the Legislature is the representative. Chicago vs. Rumsey, 87 Ill., 355; The People, ex rel., vs. Walsh, et al., 96 id. 232; City of Chicago vs. Union Building Association, 102 id. 379. So here, instead of one sovereignty invading another, as in the cases referred to, we have the General Assembly simply authorizing that property held by one of its agencies shall be burthened with a charge for the benefit of another of its agencies to the extent it has been benefitted by that agency, in regard to a matter in which the citizens and property

owners within the territorial limits of such last named agency has no exclusive interest, but only an interest in common with the entire public. The question relates purely to the right of the State to apportion a public burden upon public, in common with private property, in proportion to the benefits conferred upon that property, and in nowise involves any questions conferred upon that property, and in nowise involves any questionh of conflicting sovereignties.

"The remaining objection, we think, involves no serious difficulty, though, at first blush, it may seem to do so. We certainly do not hold the court house square may be sold and the title passed to private parties, or to the city. In Taylor vs. The People, ex rel., 66 Ill., 322, we held, explaining Scammon vs. The City of Chicago, supra., that in such cases the amount should be paid out of the treasury. Should this not be done, mandamus would lie to compel it. (City of Olney vs. Harvey, 50 Ill., 453). And it seems that the judgment at law must precede the mandamus, the latter being in the nature of process of execution of the former. The People ex rel. vs. Board of Supervisors, 50 Ill., 213.

* * * * * *

"Some objection is taken to the form of judgment, but this we regard as of no moment. No execution can issue upon the judgment, nor can the court house square be sold by virtue of it. If it shall not be paid without coercion, that coercion must be by mandamus against those who properly represent the country, and are derelict in the performance of their duty in that regard."

In Higgins vs. The City of Chicago, 18 Ill., at page 280, the court said:

"The assessment of public taxes, or special assessments for public improvements, upon the public property of the State, county or municipal corporations, is a mere question of policy. The power exists to make it bear its share of the one or the other. Canal Trustee vs. Chicago, 12 Ill., R. 405; Ross vs. Mayor of New York, 3 Wend. R. 335.

"The language authorizing an assessment on property for benefits from laying or extending streets (Chapter Cap. 6, Sec. 2) is very broad and comprehensive, and no reason is apparent why the public square may not receive a due share of the benefit with any other realty on the same street. The corporation of the city or the county may, if not specially exempted, justly pay a part of the assessments proportionate to the benefits conferred by the improvements. Such mode of apportioning the burthen is very just and reasonable, for under it alone many taxpayers will contribute a share for the benefits bestowed on their property in common, who, otherwise, would pay nothing, and yet enjoy the benefits resulting from the improvement."

And the distinction between taxation and local assessment has been often declared by the Supreme Court of Louisiana. In the case of Charnock vs. Levee Co., 38 An., p. 326, the court said:

"But in the course of time the matter has been considered over and over again in our own courts, and in the courts of sister States and by an inveterate course of decision, with rare exception, it has ripened into the settled principle of constitutional construction, that local assessments or contributions provided for the purpose of constructing public works for the advantage of particular districts and levied on property benefited thereby and with reference to such benefit, are not considered as taxes

within the meaning of constitutional restrictions on the power of taxation. Board vs. Lorio Bros., 33 An., 276; Railroad vs. Board of Health, 36 An., 666; Burroughs on Taxation, Chap. 22; Cooley on Taxation, Chap. 20."

See also Barber Asphalt Co. vs. Gogreve, 41 An., pages 263, 264 and 265, where a large number of authorities from various States and text writers are collected and cited, and among them the Drainage Case, in the 11th An., p. 371, arising under the Act of the Legislature of 1835.

The effect of a statute similar to the provision of Act 30 of 1871, under which the previous assessments were confirmed and made exigable, has often been declared by the Supreme Court of the United States. In New Orleans vs. Clark, 95 U. S., p. 644, the court, at pp. 654 and 655 said:

"The Constitution of Louisiana of 1868, which provides that no retroactive law shall be passed, does not forbid such legislation. A law requiring a municipal corporation to pay a demand which is without legal obligation, but which is equitable and just in itself, being founded upon a valuable consideration received by the corporation, is not a retroactive law—no more so than an appropriation act providing for the payment of a pre-existing claim. The constitutional inhibition does not apply to legislation recognizing or affirming the binding obligation of the State, or of any of its subordinate agencies, with respect to past transactions. It is designed to prevent retrospective legislation injuriously affecting individuals, and thus protect vested rights from invasion."

This doctrine was fully recognized in Read vs. Plattsmouth, 107 U. S., where the court, at page 575, quotes the above language.

The same principle was recognized and applied in Gran-

ada County Supervisors vs. Brogden, 112 U. S., p. 261, where the head-note is as follows:

"A municipal subscription to the stock of a railroad company or in aid of the construction of a railroad, made without authority previously conferred, may be confirmed and legalized by subsequent enactment, when legislation of that character is not prohibited by the Constitution, and when that which was done would have been legal had it been done under legislative sanction previously given."

See also Anderson vs. Santa Anna, 116 U. S., pages 356 and 364.

And these assessments against the City of New Orleans are not effected by the fact, that perhaps, the public property on the area of which they are levied cannot be sold in default of voluntary payment by the city, to pay said assessments.

It was claimed in the Court of Appeals that even if the various drainage acts imposed an obligation on the city to pay the special taxes assessed against it as quasi owner of the streets, squares and public places, and if the Act of 1871 confirmed these assessments and made them exigible, *i. e.,* payable by the city, still these status are inoperative because they prescribe no mode for the enforcement of the obligation, otherwise than by the foreclosure of the tax privilege, and the sale of these public places, which are beyond the power of either the legislature or the municipality to alienate. But we are relieved of all difficulty on this point by the decision of the Supreme Court in United States vs. New Orleans, 98 U. S., 381, since affirmed in Wolff vs. New Orleans, 103 U. S., 358, involving the liability of the city to pay the principal of bonds issued under authority of a statute of the State of Louisiana, which

provided for the levy of taxes to pay the yearly interest due thereon, but made no provision for the payment of the principal at maturity. Mr. Justice Field in discussing the question states that when municipal corporations are created the power of taxation is vested in them as an essential attributes for all the purposes of their existence, unless its exercise be, in express terms, prohibited, and that in a city like New Orleans, situated on a navigable stream, their powers are usually enlarged so as to embrace the building of wharves, docks and levees, and roads, and that all of them require the expenditure of considerable money, which must ordinarily be raised by means of taxation. In conclusion, says the learned Justice: "For the same reason, "when authority to borrow money or incur an obligation "in order to execute a public work is conferred upon a "municipal corporation, the power to levy a tax for its "payment or the discharge of the obligation accompanies "it; and this, too, without any special mention that such "power is granted. This arises from the fact that such cor- "porations so seldom possess—so seldom, indeed, as to be "exceptional—any means to discharge their pecuniary ob- "ligations except by taxation."

The drainage assessments in this case being made obligations of the city it must be presumed upon, the same ground, that the legislation ontemplated that they should be discharged by the exercise of the power of taxation, rather than by the sale of the public places. Indeed, we may safely assume that these public places were not intended to be taxed in the ordinary sense, but that their area was placed on the tax rolls as a mere measure of the liability of the city to contribute to the cost of drainage, which was to be discharged by the levy of a general tax

in the customary mode. This view of the matter leaves nothing in the argument that the assessments are void because they lead to the sale of public things, which are beyond the power of a legislature to alienate.

As well might it be contended that a debt secured by a mortgage is invalid because the mortgage cannot be enforced.

In conclusion, on this point, we submit that when the legislature in 1876 authorized the city to purchase the property of Van Norden and to pay the price out of drainage assessments, it at the same time, by necessary implication, empowered and required the city to discharge its own obligation to the fund out of which the price was to be paid, through the exercise of the power of general taxation. This was directly held in County of Mc. Lean vs. City of Bloomington, 106 Ill., 209, quoted above.

IV.

As to the amendment of the constitution of the State, adopted in 1874 and going into effect on January 1st, 1875.

This amendment reads as follows:

"The City of New Orleans shall not hereafter increase her debt in any manner or form, or under any pretext. After the 1st of January, 1875, no evidence of indebtedness or warrant for the payment of money shall be issued by any officer of said city except against cash actually in the treasury; but this shall not be so construed as to present a renewal of matured bonds at par, or the issue of new bonds in exchange for other bonds, provided the city debt

be not thereby increased, nor to prevent the issue of drainage warrants to the transferee of contract under Act No. 30 of 1871, payable only from drainage taxes, and not otherwise."

The contention is that the act of the Legislature of 1876, which authorized the city to purchase the drainage plant and franchises is null and void, because it had the effect of increasing the debt of the city in violation of the supposed prohibition contained in said constitutional amendment of 1874.

One answer to said ontention is, that the assessments, both against the city and individuals (which constitute the debt due by said city from which said warrants are to be paid) were all in existence long prior to the adoption of said amendment, and were levied and reduced to judgment as follows:

That in the First District was levied on September 13, 1861, (R. p. 110) and reduced to judgment for the first instalment thereof on March 11, 1863, (R. p. 24) and for the remaining instalments on Mar 21, 1874. (R. p. 28.)

That in the Second District was levied March 11, 1861, (R. p. 111) and for that part of said district lying in the Parish of Jefferson was reduced to judgment March 15, 1869, (R. p. 50) and for the part of said district lying in the Parish of Orleans, was reduced to judgment November 16, 1868. (R. p. 62.)

That in the Third District was levied June 11, 1872, (R. p. 111) and was reduced to judgment November 13, 1872. (R. p. 74.)

That in the Fourth District was levied November 19,

1872, (R. p. 112) and was reduced to judgment March 15, 1873. (R. p. 89.)

It seems to us that by its clear and express terms the amendment excludes from its operation the liability of the city, whatever such liability may be, growing out of its relation to drainage matters. The ordinance left, and intended to leave untouched all such liability. It affirmed the existence of the drainage fund in all its component parts, including the liability of the city as assessee of the streets, squares and other public places, which constituted nearly one-half of the fund; and it affirmed that the fund so established was applicable to the payment of all warrants drawn against it for drainage purposes, and incidentally recognized the validity of the Act of 1871, which confirmed and made exigible, *i. e.*, payable, the assessments against the city, as they appeared in the various tableaux and judgments rendered thereon. And lastly, it recognized and established the validity of the drainage contract, and affirmed the right of the city to issue, and of the transferee of the contract to receive warrants against the fund, as the Supreme Court of the State declared in 27 A. 497; where the court at page 499 said:: "The transfer, whether in pledge or in full property, made to him by said company, has been recognized by the Legislature in Act 22 of the Act of 1874, proposing an amendment to the Constitution, limiting the debt of New Orleans, and is now a part of the organic law of this State."

No other construction can be given the amendment without imputing to its authors the intention of defrauding

those who might deal with the city under its invitation and permission.

Yet the Court is asked to hold by construction that a constitutional amendment which authorized the city to draw warrants against this drainage fund, operated to destroy and render it valueless by prohibiting the city from paying into the fund the taxes out of which the warrants were to be satisfied Authority to draw warrants against the fund necessarily carried with it by implication a duty and obligation on the part of the city to apply the drainage taxes, including those the city itself owed to their payment. These taxes being debts of the city at the date of the adoption of the amendment, cannot by any course of reasning be included in the clause prohibiting an increase of the indebtedness of the corporation after January 1, 1875. The amendment, even if it had provided in express terms that no debt of the city of New Orleans should be valid, would be construed to apply to future transactions only, for it is a fundamental rule of interpretation that laws apply to the future and not the past.

McEwen vs. Dew, 24 H. 242.

But construing the amendment from a broader standpoint and by the light afforded by the circumstances under which it was adopted, it seems clear to us that the authors intended to exclude all matters of drainage from its operation, and to leave the city free to carry out the plan of improvement then in course of execution. The drainage work had been in progress during three years and was yet unfinished, and we think it may fairly be assumed that the purpose of inserting a clause in the amendment authoriz-

ing the city to draw warrants, payable out of drainage taxes, was to permit the city to complete the improvement and to use the drainage fund to its full extent for that purpose, as provided in the legislation then in force. The powers and duties of the city in this respect were neither abridged in terms, nor increased, but were on the contrary expressly continued and affirmed.

It is contended, however, by the learned counsel for the defendant that the assessments against the city are void and do not constitute a debt of the city, and that, therefore, the act of 1876, authorizing the purchase from Van Norden increased the debt of the city contrary to the prohibition contained in the amendment, and for that reason is void.

Our answer to this is that even if the drainage taxes assessed against the city were not debts, the amendment simply prohibits an increase of the city debt after January 1, 1875, but imposes no limitation on its right to contract an indebtedness after that date, unless its debt should thereby be increased in excess of the amount it then owed. Whether, therefore, the act of 1876, authorizing the purchase increased the debt, is a question of fact, which can only be determined by evidence showing the amount of the debt on the first day of January, 1875, and on the 6th of June, 1876, when the purchase was made. Neither the pleadings nor the proofs in this case show these facts. If, therefore, the act of 1876 did in fact for the first time impose on the city a liability for drainage taxes to the extent of $300,000, as contended by defendant's counsel, it does not follow that the debt of the city was increased thereby.

Certainly, this Court cannot assume the existence of the fact to support a mere suggestion that a law of the State is unconstitutional. On the contrary, courts always indulge the presumption that the legislature before passing a law, the constitutionality of which depends upon the existence of particular facts, found the facts to be such as to warrant the legislation.

In Cooley's Constitutional Limitations (5 Ed. 222) the author says:

"If evidence was required, it must be supposed that it "was before the legislature when the act was passed; and if "any finding was required to warrant the passage of the "special act, it would seem that the passage of the act "itself might be deemed equivalent to such finding." A very full discussion of this question will be found in the case of United States vs. Demoines, etc., 142 U. S. 544, to which we refer the Court.

But it can make little difference whether the act of 1876 was constitutional or not, because defendant has had the benefit of the act of the legislature of which he now complains, in the acquisition and enjoyment of property, acquired at a purchase made in pursuance of the provisions thereof.

In Daniels vs. Tierney, 102 U. S., page 415, the Court, at page 421 said:

"It is well settled as a general proposition, subject to certain exceptions, not necessary to be here noted, that where a party has availed himself, for his own benefit, of an unconstitutional law, he cannot in a subsequent litigation with others, not in that position, aver its unconstitutionality as a defense, although such unconstitutionality may have been pronounced by a competent judicial tribunal

in another suit. In such cases the principle of estoppel applies with full and conclusive effect."

If the act of 1876 was in fact unconstitutional, the City of New Orleans contracted to purchase in error of law. D'Aguesseau, in his dissertation on Mistakes of Law, printed in Vol. 2 of Potier on Obligations, p. 350, says:

"Error of law ought not to give any person a title of "acquisition; the reason is evident, and Cujas comprises it "in his Commentary on Law, 8 ff. *de juris facti ignorantia*, "otherwise an ignorance of law would be an advantage to "one making a mistake. * * * Hence those "solemn definitions of law; ignorance of the law does not "profit those who are desirous of acquiring an advantage."

Domat, after declaring that error of law is not sufficient as an error of fact is, to annul contracts, says: "(1) If "error, ignorance of law, be such that it is the only cause "of the contract in which one obligates himself to a thing "to which he is not otherwsie bound, and there be no other "cause for the contract, the cause proving false, the con- "tract is null. (2) This rule applies not only in preserv- "ing the person from suffering a loss, but also in hindering "him from being deprived of a right which he did not know "belonged to him. (3) But if by an error or ignorance of "the law one has done himself a prejudice which cannot be "repaired without breaking in upon the right of another, "the error shall not be corrected to the prejudice of the "latter." See note at foot of Sec. 139, 1 Story Equity Jur.

Says the Supreme Court in Griswold vs. Hayard, 141 U. S. 284: "Mere mistakes of law stripped of all other "circumstances constitute no ground for the reformation "of written contracts."

And the law of Louisiana is in harmony with these principles, for Article 1846 of the Civil Code declares that error at law can never be alleged to acquire the property of another.

V.

Prescription of Five Years and Ten Years.

As to the prescription of five years claimed under Article No. 3540 of the Civil Code:

This article, under the settled jurisdiction of the State, applies only to unconditional promises to pay a fixed sum of money on a day certain, whether the obligation be negotiable under the law merchant or not. Conditional obligations which lack these essentials characteristics have never been held to come within its provisions. Defining what is a promissory note within the meaning of the article, the Supreme Court of the State, in Bank of La. vs. Williams, 21 An., 121, describes it to be "a written agreement by one person to pay another person therein named, absolutely and unconditionally, a certain sum of money at a time specified therein." In Thompson vs. Simmons, 22 An. 450, the same definition is again given, the Court holding that an instrument by which a party promised to pay a debt out of a crop, if he raised one, without fixing a definite time of payment, was an obligation contracted on both a suspensive and protestative condition, having none of the characteristics of a note, but giving rise to a personal action subject to the prescription of ten years under Article 3508 of the Civil Code. The same rule was followed by the Court in Bird vs. Livingstone, 1 Rob. 183, in dealing with an order payable conditionally out of a particular

fund, as the warrants are in this case. So, in Jewett vs. Irwin, 9 La. 231, it was held that an agreement of an agent to collect and pay over the proceeds of notes placed in his hands, as it did not bind him absolutely as a debtor, did not come within the prescription of five years, as provided in Article 3540 of the Code. And in Davidson vs. New Orleans, 34 An., at page 177, the Court said of the class of obligains in suit, as follows: "Payment of those warrants is, therefore, to be regulated by the provisions of the authority under which they were issued, and that authority expressly confines it exclusively to a special fund when realized and if realized. It is to take place *only* from the drainage assessments or taxes "and not otherwise." The payment, therefore, was to be completely hypothetical, contingent upon eventicalities susceptable of happening, or not, and was glaringly restricted to well defined limitations."

The warrants, therefore, did not become due until there was cash on hand to pay them, which seems not yet to have happened.

Independent, therefore, of the fact that the city was an express trustee, and as such excluded from pleading the statute, the prescription of five years has no application to these warrants.

As to the prescription of ten years, claimed under Articles 3544 and 3547 of the Civil Code, which relates to all personal actions except those otherwise specially enumerated in said Code.

The first thing to determine here is the relation between the city and the drainage fund. Under the Act 30 of 1871,

from the time she took charge, she was a trustee of said fund, compulsory and non-contractual, it is true—as was decided in the Peake case, 139 U. S .342, and again declared in the present case, 167 U. S., page 477; and after the contract of sale on June 7, 1876, a voluntary and contractual trustee, as was decided in the case of Warner vs. New Orleans (this case), where she voluntarily contracted:

"Not to obstruct or impede, but, on the contrary, to facilitate, by all lawful means, the collection of the drainage assessments as provided by law until said warrants have been fully paid ,it being well understood and agreed by and between the said parties hereto that collections of drainage assessments shall not be diverted from liquidation of said warrants and expenses as hereinabove provided for, under any pretext whatsoever, until full and final payment of the same."

Whatever her relation before this date, she certainly after said date became, voluntarily, the trustee of an express trust, to-wit: (Perry on Trusts, Sec. 24), of the drainage tax assessments, and the law on this condition of things is, as declared in Lewis vs. Hawkins, 23 Wall, page 119, where the Court at page 126, said:

"As between trustees and *cestui que* trust, in case of an express trust, the statute of limitations has no application, and no length of time is a bar. Accounts have been decreed against trustees extending over periods of thirty, forty and even fifty years. The relations and privity between trustee and *cestui que* trust are such that the possession of one is the possession of the other, and there can be no adverse possession during the continuance of the relation. * * *

A *cestui que* trust cannot set up the statute his *co-cestui que* trust, nor against his trustee. These rules apply to all cases of express trusts. As between trustees and *cestui que* trust, an express trust, constituted by the act of the parties themselves, will not be barred by any length of time, for in such cases there is no adverse possession, the possession of the trustee being possession of the *cestui que* trust."

In Perry on Trust, this law is stated in Section 863 as follows:

"As between trustee and *cestui que* trust, in the case of an express trust, the statute of limitations has no application, and no length of time is a bar. Against an express and continuing trust, time does not run until repudiation or adverse possession by the trustee and knowledge thereof on the part of the *cestui*. Such a trust is only barred on the doctrine of prescription of twenty years, and so long as the relation of trustee and *cestui* continues unbroken, the possession of the trust is that of the *cestui*, and there can be no adverse possession for the time to run upon. The trustee must clearly repdiate the trust and assume an adverse position, without notice to the *cestui*, before the statute can begin to run. When these facts exist for twenty years an action to recover the land is barred; and when the relation of trust is denied, or time and acquiescence have obscured its nature, or acts of the parties raise the presumption unfavorable to its continuance, the lapse of time may be a ground for refusing relief. The mere fact that money due the *cestui* is allowed by him to remain in the trustee's hands, does not change the nature of the debt; it continues to be a trust debt, upon which neither bank-

ruptcy of the trustee nor the statue of limitations can take effect. Accounts have been decreed against trustees, extending over periods of thirty, forty and even fifty years. The relations and privity between trustee and *cestui que* trust are such that the possession of one is the possession of the other, and there can be no adverse claim or possession during the continuance of the relation.

Lord Justice Knight Bruce said that where one entered into possession as trustee, he could not be permitted to set up a possession or title in himself adverse to the *cestui que* trust.

It is the duty of the trustee, if he intends to claim the estate, to resign his trust and deliver the possession which he received as trustee. He will then be in position to maintain his claim, for no claim should be made through a breach of trust. And no trustee, while occupying a place of trust and confidence should be allowed to set up adverse title. The rule applies to all acting as trustees, whether regularly appointed or not. It also applies to all who stand in a fiduciary relation to others, as executors, administrators, guardians or agents. A *cestui que* trust cannot set up the statute against his *co-cestui que* trust nor against his trustee. If one hold title to land as security for money; and the money is paid to him and received, he cannot plead the statute as a bar to a bill for reconveyance. These rules apply to all cases of express trusts. After the termination of a trust a reasonable time is allowed for settlement, and then the statute begins to run. The statute does not run in favor of a trustee against his *cestui* while the latter is

in possession. After the statute begins to run in favor of the *cestui* the death of the trustee will not stop it."

And the City does not pretend that she has ever disavowed the trust first imposed on her by statute, and lastly voluntarily acknowledged and assumed in the act of sale. On the contrary, the answer filed in this case constantly asserts that she has, faithfully, and at all times performed her whole duty, by enforcing the collection of drainage taxes to the full extent of her power and ability, acts utterly inconsistent with repudiation of the trust. Beginning at page 192 declares:

"Subsequent to said Act of 1876, it applied itself with great diligence, and to the full extent of its abaility to improve and make serviceable, the canals, levees and other drainage work of said company and its assignee, and to drain the lands, and this defendant established a bureau, or office in the City Hall, and the holders of drainage warrants appointed an agent, who was placed in charge of the same * * * to proceed with the collection of drainage taxes, who gave such instructions as he deemed judicious, as to the collection of such taxes, which were always followed by the officials of the respondent," (the city) "and besides, respondent did all in its power to prosecute the collection of the same; and the service of the attorneys and executive officers of respondent in this behalf, were directed at all times to such collections * * * ; the drainage taxes were extended on the regular tax bills of this respondent, asserted and claimed in every account filed in the courts by administrators, executors, syndics and per-

sons exercising like authority, * * * and by said modes and others, collections were made and accounted for."

Similar assertions are found throughout the answer, and finally the city has filed schedules showing the collection and disbursement of drainage taxes up to June, 1891—all in affirmance of the trust. (R. pp. 319 to 349.)

The burden of the answer is, that while the city is a trustee for drainage taxes, and has executed her trust faithfully, by collecting assessments against private persons, she has not accounted for the taxes assessed against herself, because she does not legally owe them.

Nor does prescription run against the claim of a trustee as long as he remains in administration of the trust property. See Succession of Farmer 32, An. 1037, because the trustee cannot sue himself, and hence prescription remains suspended during the term of administration. At page 1041 the court said:

"Being incapacitated from judicially enforcing her claim by the law itself, prescription necessarily is suspended, and the doctrine of *contra non valentam*, etc., is clearly applicable to administrators, curators or tutors thus situated."

And on the other hand the administrator of a succession cannot plead prescription as long as he remains such, in discharge of his own liability. See McNight vs. Calhoun, 36 Ap. 408.

Nor are the taxes assessed for drainage purposes subject to any prescription.

In the case of School Directors vs. City of Shreveport, 47 An., 1310, the court at page 1312 said:

"The amount collected by taxation for a specific purpose is a trust fund. The application of the fund is usually enforced by mandamus. We cannot see the application of prescription to protect the municipal corporation from liability for the funds thus collected and withheld."

In Reed vs. His Creditors, 39 An., 115, the court held tax laws were *sui juris*, and that the provisions of the Civil Code under the title of prescription does not apply to taxes, citing State ex rel., Jackson vs. Recorder, 34 An., 178, and Davidson vs. Lindoff, 36 An., 765, and we take it to be a general rule that unless the law which a tax is assessed provides a limitation, none exists. The most conclusive case of all on this subject is that of Davidson vs. Lindoff, 36 Annual, where the Court, at page 766, recites the provision of the City Charter, as follows:

"Section 20 of the City Charter of 1870 provides: 'That the taxes assessed and levied by virtue of this act, * * * are hereby dec lared to be a lien and privilege upon said property, * * * and said lien and privilege shall exist in favor of the City of New Orleans * * * until the same shall be fully paid; and the same shall be paid in preference to all mortgages and encumbrances other than taxes due the State."

And then said:

"Under this law the tax privileges of the City of New Orleans were practically imprescriptable."

The statute under which the assessments herein were levied is even stronger than the above, for after providing for the creation of the mortgage to secure said assessments, declared in the latter part of the 7th section therof:

"Said lien, privilege and first mortgage shall take precedence over all mortgages, liens and privileges whatsoever, whether tacit, conventional, legal or judicial, and shall attach to said property until the amount assessed and interest thereon shall have been paid in full."

Surely under the authority of the last case the taxes involved in this suit are imprescriptable.

And so strictly is the statute of prescription construed, that it applies to future and not prior assessments. City vs. Vrigole, 33 An., 39; Succession of Dupuy, 31 An., 781; 34 An., 178.

There is no prescription applicable to drainage taxes, but in no event could such statute be pleaded by the City owing taxes while she was trustee, and a trustee who owes a debt to the trust is treated in law as if he had collected the same, and is charged with the amount as an asset in hand.

Perry on Trusts, Sec. 440; Stevens vs. Gaylard, 11 Mass. 269; Sigourney et al., Admr., vs. Wetherell, 6 Mat., 557-558; Leland vs. Felton, 1 Allen, p. 533; Commonwealth vs. Gould, 118 Mass., 307.

We then have a case of a trustee with trust money in hand claiming it is his by prescription of 10 years. Such a claim apart from its morality, and apart from its being shocking to the judicial sense, is equally bad in law, for it has never (until within a few years past) been claimed that the judgments based on the assessments on the streets and squares were not due, and in fact—as before stated—its plea of payment is the broadest admission of the debt due.

The City certainly admitted the debt was due in the First District in 1868, when a judgment was rendered against it, for the first instalment thereof, and it appealed therefrom and thereafter acquiesced in the judgment by abandoning its appeal. (R. pp. 266 to 269.) It certainly again admitted the other nine instalments due on said assessment when it filed the rolls therefor in Court and asked for their homologation, and when said rolls at its request were homologated. And certainly said assessments were due in said 1st and 2nd districts when they were confirmed and made exigible by Act 30 of 1876. The City certainly admitted her debt when she filed the rolls for the third and fourth drainage districts and procured their homologation in the said third and fourth districts. And she admitted said debt in the most solemn manner known to the law. She confessed judgment for the same.

The debt therefor, springing from the assessments on the streets and squares, is not only admitted, but judicially declared.

Of such a debt, Perry on Trusts, Section 440, declared:

"If the trustee himself owes the estate, he must treat his indebtedness as assets collected."

In Stevens vs. Gaylord, 11 Mass., 269, the Court said:

"As soon as the debtor is appointed administrator, if he acknowledges the debt, he has actually received so much money and is answerable for it."

In Sigourney and another Admr. vs. Wetherell and Others, 6 Metcalf, pages 557 and 558, the Court said:

"It is now well settled, whatever may have formerly been the rule of law, that a testator, by making his debtor

executor, does not give him the debt, by way of legacy, nor release or discharge it. In this respect he now stands on the same footing with an administrator. But as an executor or administrator cannot demand or receive payment of himself, and cannot sue himself, and yet is bound to account for his own debt,, that debt must be considered as assets. Where the same hand is to pay and receive money, the law presumes, as aginst the debtor himself, that he has done that which he was legally bound to do, and charges him with the amount as a debt paid. Whether the crediting of his own debt in his probate accounts, and even a decree of distribution upon them, where there has been no actual distribution under such decree, would be so far regarded as actual payment as to exonerate a surety, or discharge any other collateral liability, is a distinct question, the decision of which is not necessary in the present case. It is sufficient for the present case that the administrator is bound to account for his own debt, as a debt paid, and as assets, without act or ceremony."

In Leland vs. Felton, 1 Allen, page 533, the Court said:

"The liability of an executor or administrator to be charged as such in his account of administration for all debts due from himself to the person upon whose estate he administers has been frequently held by this Court. It was directly affirmed in the case of Stevens vs. Gaylord, 11 Mass. 269, where it was said: 'As soon as the debtor is appointed administrator, if he acknowledges the debt, he has actually received so much money, and is answerable for it. This is the result with respect to an executor, and the same reason applies to an administrator.' 'The con-

sequence is, that he and his sureties in the administration bond are liable for the amount of such a debt, in like manner as if he had received it from any other debtor of the deceased.' This case was followed by that of Winship vs. Bass, 12 Mass. 198, to the same effect; as were also the cases of Ipswich Manufacturing Co. vs. Story, 5 Met. 310, and Sigourney vs. Wetherell, 6 Met. 533."

And in Commonwealth vs. Gould, 118 Mass., at page 307, the Court said:

"The receiver was obliged by his bond to account for the moneys borrowed by him from the corporation before his appointment, and his omission to pay the amunot thereof to himself as receiver was a breach of the bond, for which he and his sureties are equally liable The case falls within the general rule of law, that when the same person is liable to paymoney in one capacity, and recover it and account for it in another, the law presumes that he has done what it was his duty and within his power to do, and holds him and his sureties responsible in case of his failure to do it. The rule has been aplied by this Court to cases of executors and administrators, assignees in insolvency and guardians."

Surely under no system of law could it be successfully contended that an agent or trustee, who has collected and holds the money of another, ever could become the owner thereof, or be discharged from liability to pay it to the rightful owner. Nothing short of payment would be a discharge.

And such payment—as we have seen—was never pretended until it was for the first time contended for in the

answer filed in the Peake case on March 19, 1888, and even this plea cannot prevail here as was decided by the Supreme Court and the Circuit Court of Appeals. 167 U. S., p. 467; 81 F. Rep. p. 650.

Under the settled jurisprudenct of Louisiana, the prescription of 10 years cannot prevail in this case, for it has not yet begun to run. As was decided in the Succession of Farmer, prescription does not begin to run in favor of the estate and against the administrator or executor, while the administration lasts, nor does it run in his favor, while said administration lasts, 36 An. 408. In fact it neither runs for or against said administrator, but is entirely suspended.

When we apply this law to this case ,what is the result? The averments of the answer and the accounts, furnished by the defendant, shows an uninterrupted administration from the time the City took charge of the drainage taxes in 1871 to 1891, and hence a complete interruption of prescription is applicable to a case like this.

Perhaps the most conclusive case against the defendant on the plea of prescription, is that of the Insurance Co. vs. Pike 32, An., 483. That, as this was a case for an accounting, and in the first case the Court held there was no prescription, which would protect an agent from accounting, and in the second case, after the account was filed, and showed more than 10 years had elapsed from the time the last money had been collected, the Court allowed the prescription of 10 years.

Both of the above decisions are against the contention of complainant. The former, because there is no prescrip-

tion against an accounting, and the second because the answer in this case, and the accounts filed, show the administration was continuous from 1871 to 1891.

But apart from the above, there is no prescription whatever applicable to taxes, as we have shown.

In the Lower Court, the contention on this subject was rather, that the judgments homologating the assessment rolls were prescribed by 10 years, from the date of homologation, and hence the defendant could not be held to account for them, but surely, the trustee having charge of an estate, could not be allowed to say, he has permitted the same to be lost because of not taking the necessary legal steps to preserve said estate, and then plead his own dereliction of duty in discharge of his liability to account. If such judgments were prescriptable by 10 years, which we deny, then it was the duty of the City to have instituted proceedings for their revival, which as a matter of excessive precaution she did so, and said proceedings are still pending.

Referring again to the question of prescription the city, in its brief, expressly disclaims the benefit of any prescription against its liability as a trustee of the assessments against private persons and property, but merely claims that the assessments against itself and as *quasi* owner of the streets and squares are prescribed. Counsel for petitioners say, at page 29 of their brief, "the city here does not plead prescription against her accountability as trustee of the drainage taxes due by private individuals; she claims the judgment against herself has been extinguished by prescription."

And in said proceedings to revive the aforesaid judgments of homologation, (evidently acting in pursuance of the clause of the statute given on page 87 of this brief) defendant judicially declared said judgments were not prescriptible, in the following language:

"Petitioners further show that, in their opinion it is unnecessary to take proceedings for the revival of the judgments had and obtained as aforesaid; but to protect the rights of all parties interested therein from being clouded over; and out of abundance of caution, your petitioners, without waiving or abandoning any privileges or rights conferred by the judgments aforesaid, desire to supplement the same, by an order or decree of revival." (See Record, pp. 79 and 54.)

As the assessments against private persons amount, in round numbers, to $733,00, and those against the city to $700,000, exclusive of statutory interest due thereon, and either amount will be sufficient to pay the warrants involved in this suit, the prescription claim by the city is not material. The same may be said as to the question of the liability of the city for the assessments against it—whether they are paid or prescribed, if valid, it is not material, as the private assessments with interest thereon are sufficient to pay the warrants.

VI.

As to the contention of *res adjudicata* based on the decree in Peake vs. New Orleans, 139 U. S., p. 342:

The matters necessary to constitute *res adjudicata* are thus stated in Lyon vs. Perin Manufacturing Co., 125 U. S., page 700, as follows:

"It is well settled that in order to render a matter *res adjudicata* there must be a concurrence of the four conditions, viz.: (1) Identity of the thing sued for; (2) Identity of the cause of action; (3) Identity of the parties and persons to the action; (4) Identity of the quality in the persons for or against whom the suit is made."

In the case at bar neither the parties or the cause of action are the same as in the Peake case.

In the latter case, Peake was the original complainant, and afterwards there was an intervening bill by James Jackson, and the City was defendant, but at no time, and in no manner, was the complainant a party to that case.

It is true that bill was brought by Peake for himself and

others similarly situated who might intervene for their interest therein, but surely it would bind only those who did so intervene.

In the case of Calhoun vs. St. Louis and S. E. Ry. Co., 14 Fed. Rep., page 8, Judge Pardee said:

"The equity rules that allow suits to be brought by some complainants for the benefit of all, expressly reserve the rights of absent parties."

See also the case of Hook vs. Payne, 14 Wall., page 252, where the head note is as follows:

"1. In a suit in the Circuit Court of the United States by a distributee of the estate of a decedent to recover a distributive share, the mere fact that the administrator is ordered to account before a master does not make parties all who were entitled to distribution, nor authorize a decree in their favor.

"2. If such persons do not appear before the master, no decree can be made for or against them, because they are not to be bound thereby."

Nor is the cause of action the same. The Peake case was based on drainage warrants issued for drainage work done under Act 30 of 1871. This case is based on drainage warrants given to Van Norden for his drainage plant, pursuant to Act. 16 of 1876, and issued under a bill of sale containing express and implied warranties coming into existence long after said work warrants were issued.

It is contended that purchase warrants were the basis of the intervening bill of Jackson in the Peake case, but this we think is an error. Jackson's intervention was not based on warrants of any kind, but on a judgment of law,

recovered on warrants without any declaration whatever as to whether the basis of said judgment was work or purchase warrants, (R. pp. 358 to 363) while the bill in the Peake case shows the consideration of the judgment made the basis of the Peake spit were work warrants, as follows:

"And your orator further shows that he is the holder and owner of a certain judgment based on three of the above named warrants, issued under and in pursuance of the above Act No. 30 of 1871, for work and labor done by the said Mexican Gulf Ship Canal Company, and said W. Van Norden, trans feree thereof under the provisions of said act, and measured and accepted by said City of New Orleans, etc." (R. p. 150.)

The averment of Jackson is, (R. p. 358) that his warrants are similar to those described in the bill of complaint of Peake. In his intervening bill (R. p. 358) he says as follows:

"That since the year of 1879 he has been the holder and owner of eight drainage warrants issued to the City of New Orleans according to law and similar to those described in the bill of complaint of complainant, James W. Peake, the original plaintiff in this suit; that all said warrants are dated June 6, 1876, and are numbered from 322 to 329, both inclusive, and are each for the sum of $5,000, except No. 329, which is for the sum of $10,000, making in all an aggregate sum of $45,000.

"That your orator, on April, 1887, instituted suit on said warrants on the law side of this Honorable Court, and on December 3, 1887, recovered of the defendant, the City of

New Orleans, as provided by Act. No. 30 of 1871, as the successor of the drainage commissions, established under Acts No. 165 of 1858, and No. 191 of 1859, and the various acts amendatory thereof, the sum of forty-five thousand dollars ($45,000), with eight per cent interest from June 6, 1876, and costs of suit; that your orator issued a writ of *fieri facias* on said judgment on 30 December, 1887, and the same was returned by the marshal on 8 March, 1888, no property found after due demand, all of which will appear by the record of said suit, numbered 11,558 on the docket of this Honorable Court.

"Your orator is similarly situated with the complainant, James W. Peake, and desires to unite with him in the prosecution of his suit," etc.

It nowhere appeared in that case, either by the pleadings or proof, upon what kind of warrants Jackson's judgment was based, and, as the pleadings show, Peake's averred judgment was based on warrants given for "work and labor done" * * * under the provisions of Act 30 of 1871, and Jackson's pleadings declared the warrants on which his judgment was based were "similar to those described in the bill of complaint of James W. Peake, and on Jackson's averment that he was similarly situated with complainant, James W. Peake, it is clear the whole case was treated and decided as a case based on work warrants. Any difference between the two classes was, therefore, never before the Court.

It is true that the Circuit Court, in its opinion in that case, declared the purchase warrants were "in precisely the same catagory as the other drainage warrants issued for

work," but as we have before shown, this was a mistake and was a matter not embraced in the pleadings, and the Court's opinion can have no effect outside of said pleadings. As was said by Judge Wallace, in Oglesby vs. Attrill, 20 Fed. Rep., p. 570:

"What the Court said is valuable as a contribution of legal learning, but if the Court has given very poor reasons for its conclusions, the fact of the adjudication would have been the same."

But as before stated, this precise question of the city's liability to account for the drainage taxes existing at the time of the purchase from Van Norden, has already been decided and in this very case.

VII.

It is contended the court grossly erred in decreeing the city was the absolute debtor of the drainage warrants sued on, while all the bill sought to obtain was an accounting of the drainage taxes, and that in no event could said warrants sued upon, be considered the unconditional obligations of the city until it was shown all the taxes had been lost, misappropriated or misapplied, even if then, which is denied.

The latter can only relate to the assessments due by individuals, for which the city, by her conduct, and by warranties expressed and implied has made herself liable, but there are many answers to the entire contention, and among them are the following:

In the first place, the court has never decreed the city was the absolute debtor of the warrants sued upon. A

mere inspection of the decree (R. p. 550) shows the contrary. The city is decreed to be the debtor of the complainant Warner for $6,000 with interest, to be paid in principle and interest "out of the drainage assessments set forth in the bill filed herein," which assessments the decree declares "constitutes a trust fund in the hands of the City of New Orleans for the purpose of paying the claims of complainant and other holders of the same class of warrants," &c., and the matter is then referred to a master to take and state an account, and that upon the coming in of said account, complainant will then be entitled to an absolute decree against defendant for the amount due him if the fund established by said accounting shall be sufficient to pay all warrant holders of the same class, and if not he shall recover his pro rata. There is no absolute decree against the defendant to be paid in any event, but a decree to be paid out of a particular fund of which the city is the administrator, and to which it is decided she is the debtor.

Nor is it true that it has not been established that all of the drainage assessments against individuals have not been lost or misapplied. In the 18th paragraph of the bill (R. p. 12) it is alleged that ever since said purchase, the city has done nothing to compel the payment of the drainage assessments except keep an office open where the same might be voluntarily paid, that she has adopted ordinances, and pursuant thereto the mayor of the city, by public proclamation, advised the persons owing the said assessments not to pay the same, and has done other things there enumerated to destroy the drainage fund, and by reason there-

of, and by reason of not completing said system or adopting another and draining the land, the Supreme Court of Louisiana, in the 34 An., p. 170 decided said assessments could not be enforced or collected and that this decision has become the settled jurisprudence of the State, and that since the date thereof the assessments have little or no value. And by the 19th paragraph of said bill (R. p. 14) it is alleged said assessments have now (the date of filing said bill, November 26, 1894,) "become uninforcible and worthless to holders of drainage warrants given for the purchase of the aforesaid dredge boats, implements and franchise, which from the date of said purchase up to the present time, has not paid for in whole or in part in drainage taxes or otherwise provided any means for the payment of said warrants, or offered any restitution of said property."

The record is full of proof in support of the above allegations, but happily we are relieved from any reference thereto, for the defendant in his answer admits (R. p. 196) "that large amounts of drainage taxes have been cancelled and erased under this decision, and that it has become the settled jurisprudence of the State ,but this defendant denies that said taxes have been lost 'in consequence of the suggestion or proclamation' put forth by defendant, but that said erasures and cancellations have been solely because, under the decisions of the courts, the collection of the drainage taxes could not be enforced."

Nor is it true that the bill asked merely for an accounting of the drainage tax as an inspection of its prayer will show, but further asked that from the sum found due on

said accounting complainant and other parties similarly situated be paid to the full extent of their warrants with interest thereon.

VIII.

As to the 19 different errors assigned in the petition for a rehearing, filed in the Circuit Court of Appeals, and now made part of the errors herein assigned, we have simply this to say The same errors are substantially assigned in the petition herein, and hence are answered under the discussion of said assignment of errors in the brief herein set forth.

IX.

As to the alleged wrongful allowance of eight per cent interest on the warrants sued on, from the date of their issue, and es pecially as the act of sale did not provide said warrants should have interest.

A very slight examination of the statutes under which they were issued will show how utterly unfounded this contention is.

Act No. 16 of 1876 (Stat. p. 15) after providing the city might purchase in case she deemed it advisable so to do, upon an appraisement of the property to be purchased, further provided:

"That all amounts to be paid, when agreed upon, shall be paid in drainage warrants by the City of New Orleans, which said warrants shall be issued in the same form and manner as those heretofore issued to the transferee of said company, under act No. 30 of acts of 1871, for work done. They shall be made payable out of the drainage assess-

ments, and shall be issued as soon as any agreement shall have been completed."

What is the "form and manner" of warrant provided for under said act 30 of 1871?

The 8th section of said act, (Stat. p. 11) after providing that the work done during each month should be measured by the city surveyor and the cubic yards thereof certified by him, further provided:

"It shall be the duty of the Administrator of Accounts on the presentation to him of said certificate of the City Surveyor or Engineer appointed by the Board of Administrators, by the President of said Mississippi and Mexican Gulf Ship Canal Company, to draw a warrant or warrants on the Administrator of Finance, in payment of the work so done, at the rate of fifty (50) cents per cubic yard of excavating and fifty (50) cents per cubic yard for protection levee, and said warrants to be of such denomination as may be required by the President of said Company. These warrants it shall be the duty of the Administrator of Finance to pay on presentation to him, in case there be any funds in the city treasury to the credit of the said Mississippi and Mexican Gulf Ship Canal Company; but should there not be sufficient fund to cash the said warrant or warrants, then the Administrator of Finance is hereby required to endorse upon the same the date of presentation, after which date the said warrant or warrants shall bear interest at the rate of eight per cent per annum until paid, which condition shall be set forth in the form of the said warrant or warrants."

This manner and form and the condition in said sec-

tion provided for is fully set forth in th warrant sued upon, (R. p. 109) and the said presentation thereof to the Administrator of Finance por payment is proved by his endorsement thereon, from which date (June 6, 1876) as the decree complained of rightfully declares shall "bear interest at the rate of eight per cent per annum until paid."

It was, therefore, not necessary that the act of sale should declare what interest the warrants should bear, for this was provided for, by act 16 of 1876, in connection with section 8 of act 30 of 1871.

Without the provision for interest at eight per cent per annum the warrants to be issued would not be in the manner and form and would not contain the *condition* provided for in said act 30 of 1871.

But, independent of said statutes, it is the jurisprudence of Louisiana that all debts bear interest from the time they fall due, and these warrants fell due from the date of their presentation, June 6, 1876.

X.

As to the alleged unfairness and fraud in the contract of sale of June 7, 1876, under which the purchase warrants were issued.

A charge more unfounded in fact and worthless in law was never made, and it would seem that no one but a mere tyro in the profession would attempt to collaterally impeach a sale when he is asked to pay the price due thereunder, without, at least, sepcifying some act of fraud on the part of the vendor.

In all the numerous litigations that have been had in

this matter—the Crossly cases (R. pp. 134 to 142), in the Peake cases (pp. 160 to 164), and numerous others—such an allegation was never made before the filing of the answer in this case on October 30, 1897, (R. p. 186) more than 21 years after the sale was made, and no suit has ever been brought to have said sale set aside for error, fraud or mistake, nor is there a cross bill filed herein.

It is true the sale of the dredge boats to Van Norden was made for $50,000, which was credited on an amount of $161,962.86, which the seller then owned himself, (R. p. 105) but the proof does not show, and it was not necessary in this case that it should show the amount of lien claims existing against said boats at the time, which he subsequently discharged.

And that said dredge boats were not in bad condition as alleged, but in a first-class condition at the time of sale, is shown by the evidence of Moody (R. p. 274), and by the report of the city's own appraiser, who not only reported them in good condition, but that their original cost was $205,000 from which he made a deduction of 25 per cent "for wear and tear from use and deterioration by age," and made their value $157,750.00. (R. pp. 91 to 97.)

But the dredge boats were not the only things the city bought and paid for. As she was authorized to do, by the act No. 16 of the legislature of the year 1876, having the value of the boats fixed as above, she bought from Van Norden and the Canal Company, not only said dredge boats but also the exclusive franchise granted under act 30 of 1871, and settled claims for damages against the city for a very large amount, and which he was entitled to for delay, under the provisions of act 30 of 1871, and the amount to be paid for all of the above (and not for the

dredge boats alone as is alleged) was determined after the above appraisement and report of said city surveyor, by resolution of the Council of the City, at $300,000, which said resolution (R. p. 104) declared was:

"For the purchase of all dredge boats, derricks, parts of machinery and property of every description belonging to the Mississippi and Mexican Gulf Ship Canal Company, or its transferee, and used for the excavation of drainage canals or construction of protection levees, as per inventory of the city surveyor; also for the full settlement of all claims for damages and to secure the absolute sale, relinquishment and transfer to the City of New Orleans of all rights, privileges and franchises created, authorized or arising in favor of the Mississippi and Mexican Gulf Ship Canal Company, and transferee, under and by virtue of act 30 of 1871, or under and by virtue of all other acts of the legislature of the State of Louisiana or ordinances of the City of New Orleans, and embodying the terms agreed upon between W. Van Norden and the committee of the whole." (R. p. 94.)

We submit, the decree is clearly correct on the law and the facts of the case, and should be affirmed with costs.

Respectfully submitted,

RICHARD DeGRAY,
Solicitor for John G. Warner.

No. 640. 172

Brief of Peckham for Respondent

Office Supreme Court U. S.
FILED
MAR 13 1899
JAMES H. McKENNEY,
Clerk

United States Supreme Court.

Filed Mar. 13, 1899.

640

THE CITY OF NEW ORLEANS,
Petitioner,

vs.

JOHN G. WARNER,
Respondent.

This is a *certiorari* issued by this Court on the petition of the City of New Orleans defendant below to the United States Circuit Court of Appeals for the Fifth Circuit.

Statement.

The respondent John G. Warner filed his bill of complaint against the City of New Orleans in the Circuit Court of the United States for the Eastern District of Louisiana.

To the bill of complaint the defendant City of New Orleans demurred, and the Court sustained the demurrer.

On appeal the Circuit Court of Appeals certified to this Court certain questions which were answered (see 167 U. S., 467.

The Circuit Court of Appeals thereupon reversed the decree of the Circuit Court and overruled the demurrer and required the defendant to answer the bill.

The defendant answered and complainant filed a repli-

cation and proofs were taken and the cause heard on pleadings and proofs and a decree rendered for defendant.

Complainant thereupon appealed to the Court of Appeals which reversed the decree and rendered a decree in favor of complainant.

The decree reverses the decree of the Circuit Court and remands the case to the Circuit Court, with directions to enter a decree ;

1. That the city is a debtor to Warner in $6,000, with eight per cent. interest from June 6, 1876, and that Warner is entitled to be paid that sum *out of the drainage assessments set forth in the bill.*

No *personal* judgment against the city is given.

2. That the drainage assessments, including those against the city assessee of the streets and squares, constitute a trust fund in the hands of the city, for the purpose of paying complainant and other holders of the same class of warrants.

3. That it be referred to a master to take the accounts, and that in taking them the master charge the city with the amount of drainage assessments against the city on account of streets and squares as well as with those against the owners of private property, give credit only for the sums already collected and properly expended, but that no offset be allowed for the bonds issued in exchange for drainage warrants under the Act of 1872.

4. That the master gave 30 days' notice to warrant holders to appear before him and establish their claims.

5. That upon the coming in of the report the complainant and those who have established their claims "will be entitled to an absolute decree against defendant for the amounts found due them if the fund established by the

accounting shall be sufficient" if not *pro rata*, and shall have execution.

6. That defendant pay the costs.

On the petition of the City of New Orleans this Court awarded a certiorari to review that decree.

The assignments of error are 19 in number, and are found on page 577 *et seq.*, and are both argumentative and repetitious.

The bill of complaint was filed for the benefit of complainant and all others similarly situated to hold the City of New Orleans liable for breach of trust by failure to collect, and by preventing the collection of drainage assessment warrants from individuals and from herself as assessee, because of streets and squares.

The Court below found that the city was guilty of such breach of trust and charged her with the assessments which she had so wrongfully failed to collect and directed that no offset be allowed for the bonds issued in exchange for drainage warrants under the Act of 1872.

POINTS.

First.—It surely should be regarded as a fact settled and beyond dispute in this litigation that the City of New Orleans has neglected the duties imposed upon her as trustee under the acts and contracts disclosed in this record to collect the assessments levied for drainage.

The Court below (p. 590), says that "all the facts averred in the bill have either been admitted by the answer or abundantly established by evidence."

That "the *only fact* in dispute between the parties is the question of responsibility for the alleged defects in the drainage plan. So far, however, as the answer attempts to fasten this responsibility on the Canal Company and Van Norden its transferee as a defense to this action *it is entirely unsupported by the evidence, as the counsel for the city very frankly admitted in their argument at the hearing.*"

So that, in the opinion of the Court below, that the city had, as matter of fact, neglected her duties and abandoned the work and advised the owners of property assessed not to pay the assessments, *was not really controverted.*

The State Courts have taken the same view of the facts and adjudged in Davidson *vs.* New Orleans, that the city "had abandoned the work without any probability of ever renewing it."

This Court in Peake *vs.* New Orleans, 139 U. S., 848, in the statement of facts preceding the opinion, says, in respect to the action of the city after the purchase of the property to pay for which the warrants in suit were issued, "Little, if any, work was done thereafter by the city and the abandonment of the work resulted in largely destroying the value of that which had been done, the rusting and decay of the machinery and tools and the innundation and overflow of the portions of the lands attempted to be drained.

Now, if there is any one thing more than another which confessedly was decided by this Court in this case, when the case was certified here, it is that in so abandoning the work the city committed a breach of duty to Van Norden, complainant's assignor. In 167 U. S., p. 477, this

Court says: "and *the proposition* which we affirm is, that one who purchases property, contracting to pay for it out of a particular fund, and issues warrants therefor payable out of that fund—a fund yet partially to be created, and created by the performance by him of a statutory duty—*cannot deliberately abandon that duty, take active steps to prevent the further creation of the fund*, and then there being nothing in the fund, plead in defense to a liability on the warrants drawn on that fund that it had, prior to the purchase, paid off obligations theretofore created against the fund."

Thus the contract of purchase by the City pursuant to the law of 1876, by which the City agreed (p. 476) "*not to obstruct* or impede, but on the *contrary*, to facilitate by all lawful means the collection of drainage assessments as provided by law until said warrants have been fully paid, it being well understood and agreed by and between the said parties thereto that collection of drainage tax assessments should not be diverted from the liquidation of said warrants and expenses under any pretext whatsoever until the full and final payment of the same" was held by this Court to be valid and effective, and to impose on the City the duty of going on with the work, and of not abandoning the work to the prejudice of complainant.

If we turn to the evidence in the record it is equally full and conclusive (Record, pp. 274, 91 to 97, 225 to 230, 216, 217, 218, 219, 271, 349 to 352, 319 to 349).

Second.—It must further be regarded as settled that the issue by the city of its bonds in taking up prior warrants is no defense to this suit.

That was the precise question certified and answered in 167 U. S.

That the complainant's assignor knew of the issue of those bonds, and himself took the whole of them in exchange for warrants which he then held, is without significance.

There is no allegation in the bill, there was no averment in the statement of the Court below, as the basis for the certified question, to the effect that such assignor or complainant did not know of the issue of such bonds.

The decision of this Court is not based on knowledge or lack of knowlege of Van Norden. It is based on the duty of the defendant to go on with the work and not to abandon it.

It is not thinkable that defendant at the time of purchase intended to abandon and to plead the issue of these bonds and that Van Norden knew that defendant so intended for the contract is expressly otherwise and in such case Van Norden would be selling without any chance of realizing any consideration.

Moreover, in fact, the city though repeatedly sued never did set up the issue of these bonds as a defense until some one long after the sale by Van Norden discovered and set up the defense in the Peake case. The purchase by the City was made in June, 1876. The answer in the Peake case was filed November 26, 1892, p. 492.

Until the discussion of the Peake case Van Norden knew and had heard of nothing of any claim of the City that its bonds should be credited on its liability to the fund pp. 250 and 254.

Third.—It follows as a corollary that the city must be charged as if she had collected these assessments.

She knew and must be charged with knowledge of the law of Louisiana decided in the Davidson case. That abandonment of the work gave to the assessees a good defense.

It was her duty as the one who had assumed the obligation to do this work to go on with it, at least to the extent of not affording by her default any defense to the assessees to the enforcement of the warrants.

She deliberately fails in that duty and by her act makes worthless the very warrants with which she had purchased our property.

Surely, she is liable to account to us as if she had performed the duty cast upon her.

She may abandon of course; but she must do it at her cost and not at ours.

Reilly *vs.* Albany, 112 N. York, 30, and cases cited.
Cummings *vs.* The Mayor, 11 Page, 596.
Beard *vs.* Brooklyn, 31 Barb., 142.
Hunt *vs.* Utica, Opinion, 23 Barb., 398.
Atchison *vs.* Byrnes, 22 Kansas, 65.

Fourth.—The City now assigns as error that the Court below has rendered a personal judgment against the City.

It has not, but it would be no error if it had. The decree directs an account and that the City be charged with the assessments and credited with collections properly expended.

That is not a personal judgment for the claims may so exceed the assessments.

It is, undoubtedly, a decree charging the City with all the assessments and in that it is right.

The very essence of the liability of the City in this case is that it bought our property and paid for it in assessment warrants. That these warrants could be good for anything only if the City discharged her duty in respect to collecting the assessments. If the City did not do so but abandoned the improvement, *if the City gave to the assessees* a perfectly valid defense to the assessment and to the warrants, the City failed in her duty and must be charged as if she had collected.

In the case of assessments for improvements, the contractor agreeing to take the warrants in payment, a City does not perhaps warrant that that the assessments are collectible out of the property so far as value is concerned, but she does warrant the validity of the assessments and surely at the very least and even without the affirmative covenant in this contract, she warrants that the City herself will do nothing to impair the validity of the warrant and that she will go on and continue and finish the improvement so as to give to the property the value because of giving which the assessment was made.

That the City did abandon the work and did thereby give to the assessees a defense, they otherwise would not have had is not an open question in this case and is conclusively shown to be true as matter of fact by the adjudication in the Davidson case (pp. 532–535). Surely it can need no citation of authorities for the position that neither a municipal corporation nor any other

can contract for work or property to be paid for by the exercise of its taxing or assessing power and then after having received the work or property turn around and either by action or non-action practically vacate the assessment.

Such an act would be too great "a strain upon the moral sense" to receive the sanction of any Court.

And the rule is the same as to its duty to do the work, to the end that the property assessed may derive the value for which it is assessed.

The City did not guarantee value—but it did guarantee to do the work.

Mistakes of judgment might be made as to how much the value would be increased.

Were the work done it would be no defense to the warrant that the value had not been to that extent increased; but it is plain as can be that if the assessment is made and the work *not* done, collection is robbery.

The City has given some testimony as to the small value of some of this assessed property. It is wholly immaterial. The City has given no testimony as to what the property would be worth with the *work done.*

The benefit that the property would derive from the work has been assessed, *i. e.*, ascertained in the most solemn manner and the tableaux homologated by the Courts.

The City as a negligent and culpable and voluntary trustee cannot be heard to say that the property with the work done would not be worth the assessment.

We say nothing against the right of the City, in the interest of its inhabitants to abandon the

work—to give up this or any system of drainage; what we say is that common honesty, even the lowest code of morals require city and inhabitants to do so at their own expense and not at the expense of the contractor or vendor who did all that he had agreed to do.

If the plan proved bad, inadequate, or in any respect insufficient, that was not the fault of the contractor.

The City purchased from him this property and paid for it in these warrants. It agreed not to obstruct or impede their collection; it agreed to facilitate their *collection* by all lawful means; and it forthwith proceeded to abandon the work, thus absolutely preventing their collection.

Surely in such case the City as trustee should be charged with the face of the assessments, the collection of which it has thus in violation of its contract prevented.

Fifth.—The assessment on the streets and squares is effective, and as the dissenting opinion in Peake *vs.* N. Orleans, 139 U. S., p. 369-379, says, "should under the circumstances be considered as money in hand." The assessment on streets and squares was a part of the original proceedings when the assessments were in the hands of the old boards.

To the proceedings for homologating the tableaux the City of New Orleans was a party, and judgment of assessment was rendered against her.

She took no proceedings to vacate or reverse

that judgment. It was open to her to do so. In all the multiplicity of proceedings and litigations that have occurred in respect to the drainage acts and warrants, the City has at no time prior to the Peake case claimed that such assessments were illegal.

Aside then from the question of the conclusiveness of the homologation judgments, we have this cotemporaneous construction of these acts that the city was liable to be assessed and that she was properly assessed.

Does *justice* require that, after others have acted on the faith of those assessments and of the judgment of homologation, the city should now, thirty years after, be allowed to plead non-liability?

And would it not be the grossest injustice to allow it?

And with regard to the judgments:

If the city had any defense to the assessments she had the opportunity to make it. Not making it, it is familiar law that the judgment is quite as conclusive as to all defenses which might have been made and were not as it is as to all defenses which were made and were overruled (Jordan *vs.* Van Epps, 85 N. York, 427; Reich *vs.* Cochran, 151 N. Y., 122, 127).

And why should not the city contribute? Whether the city, or in other words, the general public contributes to the cost of a great public improvement directly out of its general fund, or indirectly by assessment on public property such as streets and squares, is of little moment. Each method has been frequently adopted. When a public improvement is of great general utility, or is contemplated to be such, it is beyond question

right that a greater or less portion of the expense should be borne by the public.

Certain private property is supposed to be *especially* benefited and that *therefore* it should bear a more than average proportion of the expense is the principle on which assessments are levied.

That such private property and its owners are the *only* persons or property benefited would form no basis for an assessment or for the doing of the work by the public.

It would not then be a public but a private work. The public would have no interest and proceedings by the public to improve the property of private persons without their consent would be sheer nonsense and void.

The basic fact that a *public* improvement is contemplated *necessitates* the corollary that for some proportion of that improvement the public must pay. A failure so to do would be robbery, in that the cost of what was done for the general good would be assessed upon a few and a few made to pay for the benefit to the many.

Unless, therefore, there is something in the jurisprudence of Louisiana which compels the rejection of the assessment on the streets and squares, simple justice requires that such assessment should be sustained. Surely no such construction can be claimed for the Louisiana decisions. To say the least of them, their tendency is in accord with and not in opposition to the principle of a fair *public* contribution to the expenses of a public improvement and gives no sanction to the idea that the great State of Louisiana intended any such spoliation as would be the necessary consequence of a failure to recognize such principle.

Not only the purchase of the material by the City in 1876, but every single dollar's worth of work done and goods sold for this improvement has been upon the faith of this assessment on the City and under the law of Louisiana, and, we believe of every civilized community, the City when it drew warrants on a fund a large part of which consisted in her own assessments and liabilities as expressed in the tableaux and adjudged in the judgments of homologation warranted and agreed that that fund existed and that the assessments against herself were just and valid and would be paid and if she, under those circumstances, fails to pay such assessments she must be charged with them as if she had paid them as a consequence of her breach of trust.

Sixth.—The claims of the City of *res adjudicata* and of the Statute of Limitations and of unconstitutionality do not seem to merit serious attention.

(*a.*) It has ordinarily been supposed that to constitute an adjudication the former judgment must have been between the same parties or their privies.

The Peake case is not of that character. The warrants here sued on were not in that case. If any warrants similiar to those here sued on were in that case it may be that the holders of such warrants would meet with difficulty should they attempt to prove them under the decree herein.

No such question is or can be before the Court

now. No one pretends that the warrants which herein are adjudged were in the Peake case either by the present or any former holder.

One suing for himself and others similarly situated does not represent the others and a judgment does not bar them until and unless they come in and become parties to the suit.

(*b.*) As to the defense of a Statute of Limitations or prescription the jurisprudence of Louisiana does not differ from that of other States. The statute does not apply to or run against a trustee.

(*c.*) As to the constitutional question of exceeding the debt limitation, it has never been supposed that such provision protected a city from liability for a tort or breach of trust.

The City will not in this case increase its indebtedness. It will levy the tax which it was bound to levy.

Seventh.—Judgment of the Circuit Court of Appeals should be affirmed.

WHEELER H. PECKHAM,
Of Counsel for Complainant.

No. 172.

Br. of De Gray, Grant & Rouse for Respondent (on rehearing)

Office Supreme Court U. S.
FILED
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Clerk.

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SUPREME COURT OF THE UNITED STATES.

No. 172.—October Term, 1899.

CITY OF NEW ORLEANS, Petitioner,

versus

JOHN G. WARNER.

Additional brief in support of the petition heretofore filed by John G. Warner by leave of Court, praying for a limited rehearing on the question of interest.

RICHARD DeGRAY,
WM. GRANT,
J. D. ROUSE,
Solicitors for John G. Warner.

SUPREME COURT OF THE UNITED STATES.

No. 172.—October Term, 1899.

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Additional brief in support of the petition heretofore filed by John G. Warner by leave of Court, praying for a limited rehearing on the question of interest.

I.

The warrants issued in payment of the price of the drainage plant are in the form prescribed by the Legislature in the Act of 1871, as directed by the Act of 1876, authorizing the city to make the purchase. Each warrant was presented to the Administrator of Finance, and by him endorsed:

"Presented for payment June 6th, 1876.
(Signed) "E. Pilsbury, *Administrator of Finance.*"

They were offered, together with the certificate of presentation endorsed thereon, in evidence before the examiner (R., pp. 214, 215), without objection, and again in open Court at the

hearing (R., p. 205), also without objection, although the right to do so was reserved by agreement (R., p. 211). This evidence established the averment of the amendment to complainant's bill (R., p. 185), that the warrants had been presented for payment June 6th, 1876, but not paid, and entitled complainant to a decree for interest at the rate of 8 per cent. per annum from that date until paid, as prayed.

II.

But we do not understand that the city disputes the fact that the warrants were drawn in due form, and presented for payment, as shown by the evidence. Nothing to the contrary appears in the answer to the bill, or the assignment of error in this Court, nor was the contrary contended for in the oral argument. The contention is, both in defendant's answer to the amendment to the bill (R., p. 203), and in its brief on the merits, that the city is not liable for any interest at all. On this point the answer says "that whether or not the warrants on which complainant sues were or were not presented and endorsed as averred in said amended bill respondent has no knowledge, information or belief, but whether presented or not * * * this respondent is in no manner bound or liable in any manner on, for, or in respect to said warrants, and least of all for any alleged interest thereon."

The petition of the city upon which the writ of *certiorari* was granted, complains that the Court of Appeals erred, because "neither the Act of 1876, nor the contract of sale thereunder provides for payment of interest, and the stipulation for the payment of interest contained in the warrant was without authority of law. (See petition for writ of *certiorari*, page 25, Error 35.) The contention in petitioner's brief for the writ (p. 37) and in its brief on the merits (p. 35) is, that inasmuch as the Act of 1876 did not specially mention interest, the stipulation of eight per cent. from date of presentation was and is

ultra vires. No where is any suggestion or complaint made that the Court erred in allowing interest from June 6th, 1876. Indeed, under the undisputed proofs in the record, none could be made as to the date at which interest should commence to run.

III.

The constitutionality of the Act of 1876 authorizing the purchase of the drainage plant, and the payment of the price in drainage warrants "which shall be issued in the same form and manner as those heretofore issued to the transferee of said company under Act 30 of Acts of 1871, for work done", is not assailed; nor is it claimed that the warrants were not strictly drawn in the form prescribed by said Act of 1871, which provided that they should bear 8 per cent. interest from the date of presentation until paid. It seems to us that it was perfectly competent for the legislature to adopt the form of warrant in use under the prior Act of 1871, which included a provision for payment of interest, for there is no rule which forbids legislative bodies in passing a new Act, to adopt some part of another act by reference, and none is shown by counsel on the other side, and none can be. Says Dwarris on Statutes, page 602:

"Words in an act of Parliament (words of reference in a subsequent statute) will make a thing pass as well as if it had been particularly expressed in the act itself; *verba illata inesse videntur.* Clauses of reference, incorporating provisions of a former statute, take effect as fully as if they had been repeated and re-enacted in the body of the latter act, with relation thereto."

It follows that the stipulation for the payment of interest was expressly authorized by the Act of 1876. But if that Act had been entirely silent as to interest, we submit that an express authority to buy on credit, carries with it by necessary implication authority to stipulate for the payment of such interest as the law permits to be contracted for upon the same principle that authority to borrow money implies authority in the agent to pledge the

property of the principal to secure the loan. See Hatch vs. Coddington, 95 U. S., p. 48. It was therefore competent for the city, independent of the Act of 1876, to contract to pay interest, under the general laws of the State. Article 2924 of the Civil Code declares as follows:

"Interest is either legal or conventional. Legal interest is fixed at the following rates, to-wit:

"At five per cent. on all sums which are the object of a judicial demand, whence this is called judicial interest.

"And on sums discounted by banks, at the rate established by their charters.

"The amount of the conventional interest can not exceed eight per cent. The same must be fixed in writing.

"All debts shall bear interest at the rate of five per cent. per annum from the time they become due, unless otherwise stipulated. Civil Code, 1938.

"In contracts stipulating a conventional interest, it is due without demand from the time stipulated for its commencement until paid." Civil Code, Art. 1937.

The substance of these provisions of the Code is that parties may lawfully stipulate to pay interest at the rate of eight per cent., and that in the absence of any special agreement the creditor may receive five per cent. from the date his debt is due, but in the instant case the allowance of interest and the rate thereof is not ascertained by reference to the Civil Code, but is fixed specially by the legislature of the State.

We might show that in 1876, when these warrants were issued, eight per cent. was the usual and customary rate of interest on all time contracts in Louisiana, but it seems sufficient for us to suggest that it may be assumed that the rate fixed by statute was a reasonable one at the time. Indeed, when the character of the warrants is considered and the limited and uncertain provision made for their payment, the interest would seem insignificant. It is only now after more than twenty years spent in resisting the payment of its just debts that the city complains that the burden of interest which has accumulated through its own ne-

glect of duty, is more than it ought to bear. Not only has the city neglected to apply the taxes for which it was debtor to the payment of the warrants, but has persistently and actively obstructed the collection of those due by private persons, contrary to its covenant in the bill of sale. Certainly there is nothing in all this which will entitle the defendant to relief, even if a court of equity has the power to disregard and set aside the stipulations of a lawful contract, which we submit, it has not.

We respectfully submit that interest should be allowed on the complainant's warrants at the rate of eight per cent. per annum from June 6th, 1876, until paid, and that the decree entered herein be amended accordingly, and pray that the decree of the United States Circuit Court of Appeals be affirmed without qualification, and that appellant be condemned to pay all costs of the appeal.

RICHARD DEGRAY,
WM. GRANT,
J. D. ROUSE,
Solicitors for John G. Warner.

No. 172.

Mr. of Peckham for Pltf. in Error

Office Supreme Court U. S.
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Supreme Court of the United States.

Filed Dec. 27, 1899.

THE CITY OF NEW ORLEANS

against

JOHN G. WARNER.

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This was a *certiorari* from this Court to the Circuit Court of Appeals for the Fifth Circuit.

This Court in all respects affirmed the decree of the Circuit Court of Appeals except as to the *date* from which interest on the warrants should begin to run.

The decree (Record, p. 550) awarded interest on the warrants at the rate of 8 % from June 6, 1876.

This Court, in the opinion, thought that interest should not begin to run until the date of the filing of the bill, Nov. 26, 1894 (Record, p. 1). The *rate* of interest (8 %) was considered by this Court and as to the *rate* the decree below was affirmed (see Opinion).

The reason expressed by the Court for changing the date from which interest should begin to run was a good reason, had the record been such as the Court supposed it to be. That reason was that the warrants had not been presented for payment as provided by law, and that consequently there had been no demand for payment prior to the filing of the bill, which in itself, this Court said, constituted

a demand, and was the basis for the allowance of interest from that date.

Thereupon the respondent presented to the Court a petition for a limited rehearing on the ground that the Court had inadvertently overlooked an amendment to the bill specifically alleging the very presentation, &c., in 1876, which the Court assumed had not been done (Record, pp. 184–5), and also the proofs in support of such allegation (Record, p. 205).

The Court directed that such petition be filed, and allowed to both sides fifteen days to file any further briefs.

Points.

First.—We understand that the only question for discussion is the *date* from which interest shall run.

The respondent makes this application—not the City of New Orleans.

The respondent complained *only* that the Court had inadvertently fixed the wrong date.

When respondent asked leave to file that petition which raised only the question of the date from which interest should run, and the Court gave leave to file the petition for rehearing on question of interest only, and gave leave to counsel to file additional briefs within fifteen days, the Court surely referred to the question of interest raised in and by the petition.

The decision of the Court must be construed with reference to the question before the Court, and we submit with the

greatest confidence that by no possibility can the petition of the respondent for a rehearing on the question of interest only be construed as raising any other question than that the date from which interest should commence to run should be as directed in the Court below and not as stated in the opinion of this Court.

Second.—Assuming that such is the only question the decree of the Court below is plainly right and the modification by this Court an inadvertence.

The original bill (p. 1) contained no allegation of the presentment of the warrants for payment which we suppose to be the cause of the inadvertence into which the Court fell.

That defect in the original bill was cured by an amendment filed September 3d, 1897 (Record, pp. 184–185), which alleged presentment June 6, 1876, and prayed for a decree with interest from that date at the rate of 8% per annum.

The city of New Orleans, on October 30, 1897, filed two answers—one to the original bill (Record, p. 186) and one to the amendment (Record, pp. 202–3).

The answer to the amendment says, "That whether or not the warrants on which complainant sues were or were not presented and endorsed, as averred in said amended bill, respondent has no knowledge, information or belief," and it says nothing more or different with respect to such averment in the amendment to the bill.

That denial probably made a formal issue but it will be noted that the denial is not made in the positive manner which might be required of the city when its own act, at least in the matter of the endorsement, was in question.

The denial, if sufficient for a formal issue, is yet weaker in character when it is remembered that a copy of one of the warrants sued on was made part of the original bill (Record, p. 11, paragraph 14) and filed with said original bill (p. 109), with the words at bottom : "Presented for payment June 6th, 1876," at the foot and purporting to be signed by the city's financial officer—" E. Pillsbury, Administrator of Finance."

Proofs on this issue were taken by the complainant below.

On p. 205 of the Record it appears :

" Complainants offer in evidence the drainage warrants sued on in this case Nos. *together with the presentation of said warrants at the bottom of each.*"

True the record does not there state that the three warrants, &c., were *received* in evidence; but the statement as to the warrants, presentation, &c., is the same as the statement as to every other piece of evidence offered by each side (Record, pp. 205 to 211 inclusive).

That all the proofs so referred to as offered in evidence were read in evidence does conclusively appear from "Agreement as to Transcript" (Record, p. 213) where, among other things, it is agreed that the three warrants may be omitted

from the transcript because of a specimen copy being already printed.

See also under head of Complainant's Evidence (Record, p. 214): "Drainage warrants sued on, Nos. *together with the presentation of said warrants at the bottom of each.*"

And at top of p. 215 the "*Note*" that the three drainage warrants sued on may be omitted from the transcript because already printed, &c.

We thus find that the proof is ample and conclusive that the warrants were presented June 6, 1876.

It consists of the act of a public officer in writing on the warrants what the law required him to write.

Sec. 8 of Act No. 30 of 1871 made it the duty of the Administrator of Finance to pay drainage warrants on presentation, or, in default of payment for lack of funds, to endorse upon the warrant the date of presentation, after which the warrant should draw interest at the rate of 8% per annum.

See p. 11 of copy Acts of Legislature filed with the Court on the argument.

Sec. 3 of Act No. 16 of 1876 provides that the property purchased thereunder shall be paid for in *drainage warrants* which shall be issued in the same form and manner as those issued under Act 30 of 1871, and that they shall be payable out of drainage assessments and shall be issued so soon as any agreement shall have been completed.

See pp. 15 and 16 of said copy acts.

What higher evidence could there be that the warrants had been presented for payment, and there being, as claimed by the city, no funds, had been endorsed as presented according to law?

Clearly these allegations and these proofs had been overlooked by the Court, and on the argument no point of the kind had been raised or made by counsel for the city.

Third.—The necessary and inevitable result is that the decree below must be affirmed *without any modification* unless the City of New Orleans can point to some proofs in the record showing that the warrants were not presented in 1876.

There is no such proof, and we do not imagine that it will be claimed that there is.

Fourth.—If the City of New Orleans claims that the question whether *any* interest should be allowed is now open for discussion, and should be discussed, as we understand that it will, we submit that such claim is without foundation.

That question was argued on the original hearing. It is argued in the brief of counsel for the city on the petition for a *certiorari*, p. 3, last paragraph, and that brief was used on the argument of the case on return to the writ of *certiorari*.

It was discussed in point IX, p. 100, *et seq.*, of the brief submitted by Messrs. De Gray, Rouse and Grant, and it was discussed in the XIII point, p. 37, *et seq.*, of the brief submitted by Messrs. Rouse & Grant.

The writer of this brief has before him his own manuscript notes according to which he orally argued the same point.

This Court in its opinion discusses and decides that point.

The City has presented no petition asking for a reargument on that point, and no one has suggested that on that point anything in or out of the record has been overlooked by the Court.

Without a petition showing some inadvertence — something overlooked - surely no reargument can be had.

This rehearing on our petition in all conscience must be restricted to the single point whether as matter of fact the record shows that the warrants were presented on June 6, 1876.

Fifth.—But if the City of New Orleans could raise the question whether it is liable for any interest, it is too trivial for serious consideration.

For what are the very gist and substance of the adjudication in this case but that the City of New Orleans on the 6th day of June, 1876, was guilty of a wrong and a breach of trust when it refused to pay these warrants?

It then had in hand as between it and the warrant holders, as this Court has now

held, all the assessments against the City.

It then and thereafter, as this Court has held, instead of doing its best to further and not to impede the collection of warrants, did all it could to impede such collection.

Statute or no statute; in law or equity is there a Court in the world which given those premises, would not in some form, whether of damages or interest, compel a defendant to make good the loss occasioned by his wrongful delay?

Would any one pretend that compensation had been made—that justice had been done by a mere rendition of the original sum and nothing for these twenty-eight or nine years of delay and litigation?

Surely no such proposition should even be entertained.

In the matter of these drainage warrants the City of New Orleans has exhausted every possible line of defense, and we submit should now address herself to the problem of payment rather than of further and hopeless litigation.

Sixth.—The judgment of this Court we submit should be that the decree below be affirmed, *with costs*, as respondent's success is then complete, and that the death of the complainant Warner since the argument having been suggested on the record that the judgment be entered *nunc pro tunc* as of the day of the argument.

WHEELER H. PECKHAM,
Of Counsel for Respondent.

NEW ORLEANS *v.* WARNER.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 172. Argued March 13, 1899. — Decided November 13, 1899.

Following the decisions of the Supreme Court of Louisiana, this court holds that the drainage warrants of the city of New Orleans, in question in this case, being neither bills of exchange, nor promissory notes, nor notes pay-

Syllabus.

able to order or bearer, nor effects negotiable by indorsement or delivery, are not included within the terms of Article 3540 of the Civil Code of Louisiana, prescribing certain actions therein named; and are not prescribed by the statutes of that State.

The city of New Orleans, having voluntarily assumed the obligations of a trustee with respect to the fund to be raised by the collection of drainage assessments, cannot set up the prescription contained in Article 3547 of the Code against an application which, as such trustee, it had undertaken and had failed to perform — the rule being well settled that, in an action by a *cestui que trust* against an express trustee, the statute of limitations has no application, and no length of time is a bar.

It is immaterial whether the assessments against the city itself for the drainage of public property were reduced to judgments or not: by reducing its own claim to judgment, it neither ceased to be debtor nor trustee.

The judgment and decree in *Peake* v. *New Orleans*, 139 U. S. 342, cannot be considered as a controlling authority in this case, the facts being different, as shown in the opinion of the court in this case; and it would be inequitable to permit the city to set up that decision as an excuse for its failure to collect these assessments.

A judgment for taxes does not differ from any other judgment in respect to its conclusiveness, and the city of New Orleans cannot, after the lapse of more than twenty years, question its liability upon the judgments against it for the amount of these assessments.

It was the intention of the amendment of 1874 to the constitution of Louisiana, limiting the power of New Orleans to contract debts thereafter, to validate the issues of drainage warrants, some of which are questioned in this suit, not only for the work done, but for the property purchased by the city, in case it should elect to do the work itself.

The fact that the city chose in 1876 to pay for property which Van Norden bought from the Ship Canal Company in 1872 six times as much as he then paid for it, is one that cannot be considered here; as, from the decision in *Fletcher* v. *Peck*, 6 Cranch, 87, to the present time this court has uniformly refused to inquire into the motives of legislative bodies.

The objection that the decree finds the city a debtor to the complainant in the amount of the warrants is more apparent than real, since it also declares that he is entitled to be paid out of the drainage assessments, refers it to a master to state an account of such assessments, and provides for an absolute decree against the city only if the fund established by the accounting shall be sufficient, and for a *pro rata* decree if such fund be not sufficient to pay all the warrant holders in full.

The liability of the city to pay interest was conditioned upon the presentation of the warrants and the indorsement upon them of the date of such presentation; but the commencement of suit was a sufficient demand to charge the defendant the interest from that day, at the rate specified in the contract.

Statement of the Case.

THIS was a bill in equity filed November 26, 1894, in the Circuit Court for the Eastern District of Louisiana by John G. Warner, a citizen of the State of New York, on behalf of himself and all other parties holding obligations of the same nature and kind as himself, to charge the city of New Orleans as the debtor of specific taxes, averred to have been levied by lawful authority, for the payment of certain warrants issued for the purchase of a drainage plant and franchise, the collection of which was made the duty of petitioner by statutes hereinafter set forth. A liability on the part of the city was averred as a result of a contract alleged to have been broken by it, and a disregard and violation of duties imposed upon it by statute, as to the prosecution of the work of drainage, and the collection of assessments therefor.

The facts of the case are so fully set forth in the cases of *Peake* v. *New Orleans*, 139 U. S. 342, and *Warner* v. *New Orleans*, 167 U. S. 467, that a succinct statement of such facts, taken largely from the opinion of the Circuit Court of Appeals, is all that is deemed necessary here.

By an act approved March 18, 1858, the legislature of Louisiana provided for a system of draining certain lands within the city of New Orleans and elsewhere, which was to be carried out by boards of commissioners appointed for the three districts into which the territory was divided. The act further provided for plans of the work to be prepared by the commissioners, for assessments to be levied upon the lands benefited, and for the entry of judgments decreeing the lands to be subject to a lien for such amount as might be assessed.

By a supplemental act, approved March 17, 1859, the boards of commissioners were authorized to borrow money to carry on the work, and to issue bonds therefor. It was contemplated that the money should be raised at once for the payment of the work, in anticipation of the collection of the assessments.

By an act approved March 1, 1861, the prior acts were amended by providing for a summary mode of collecting the assessments, authorizing the commissioners to apply to certain courts for the approval and homologation of the assessment rolls, which approval and homologation the act declared

"shall be a judgment against the property assessed and the owners thereof, upon which execution may issue in the ordinary mode of proceeding."

The commissioners made plans of the work proposed to be done, including therein the streets, squares and public places within the several districts, as the property of the city of New Orleans, and from time to time judgments were rendered charging these public places, as well as private property, with the amounts that had been assessed for drainage purposes. The city was named as the owner of these public places in the tableaux, and judgments were rendered against it as such owner for sums amounting in the several districts to $719,926.63.

On February 24, 1871, the legislature passed an act entitled "An act to provide for the drainage of New Orleans." This act abolished the several boards of drainage commissioners, transferred their assets to the Board of Administrators of the city of New Orleans, subrogated this board to all the rights, powers and facilities then possessed by the commissioners, directed it to collect the balance due on the assessments as shown by the books of the drainage districts, "which said assessments are hereby confirmed and made exigible at such time and in such manner as the Board of Administrators may designate." It further authorized the Mississippi and Mexican Gulf Ship Canal Company to undertake the work of draining the city, required the Board of Administrators to place all collections of drainage assessments to the credit of such company and hold the same as a fund to be applied to the drainage of New Orleans and Carrollton. Under these and the prior acts, assessments were made and reduced to judgment against the city on the area of the streets and other public places within the drainage districts, to the amount of $696,349.30, and against private persons to the amount of $1,003,342.98, of which about $330,000 have been collected from private property in cash and drainage warrants, leaving outstanding at the date of the filing of the bill in this case uncollected assessments to the amount of $1,469,714.47, of which the city owes $696,349.30.

By an act passed February 24, 1876, after more than two

thirds of the drainage system had been completed, the city of New Orleans was authorized to purchase, if the common council deemed it advisable, the property and franchises of the Ship Canal Company or its transferee, including all tools, implements, machines, boats and apparatus belonging to said company or its transferee, on a valuation to be fixed by appraisers to be appointed by the common council, the amount to be paid in warrants drawn against the drainage assessments. It further provided that the city should have exclusive control of all the powers and franchises granted to the Ship Canal Company, and should alone have the power to do all the drainage work required to be paid for by assessment upon property or from the city treasury. Meantime, however, the Ship Canal Company, having become embarrassed, on May 22, 1872, assigned all its rights to Warren Van Norden.

Acting under the authority of this act of February 24, 1876, the city accepted the option, appointed an appraiser of the property of the Ship Canal Company, and authorized the mayor to purchase of said company, or its transferee, all its property, and to stipulate for a full settlement of all its claims for damages. Thereupon the mayor entered into a contract with the Canal Company and with Van Norden, its transferee, for the purchase of their property and the relinquishment of all their claims for damages, for the sum of $300,000, payable in drainage warrants. In this contract of sale the city covenanted and agreed "that the existing rights and powers of the holders of drainage warrants, under the civil acts of the legislature of this State relative to drainage and drainage assessments, shall remain unimpaired, and that the drainage tax and assessment shall be administered, collected and paid" in the manner and under certain terms specified, and that "the collection of drainage assessments shall be assigned to an officer, who shall be selected by the said W. Van Norden and be confirmed by the city council." The city further agreed "not to obstruct or impede, but, on the contrary, to facilitate, by all lawful means, the collection of the drainage assessments as provided by law, until said warrants have been fully paid,

it being well understood by and between the said parties hereto that collections of drainage assessments shall not be diverted from the liquidation of said warrants and expenses as hereinabove provided for, under any pretext whatsoever, until the full and final payment of the same."

The bill, after reciting these facts, averred in substance that upon acquiring the drainage plant and franchises of the canal company the city abandoned all drainage work and suffered the dredge boats and machinery purchased as above stated to decay and become valueless, and that, by reason of the city's failure to complete the drainage and benefit the lands, the courts have refused to enforce the collection of the assessments; that, having thus abandoned all drainage work, the city, by its ordinances and by a proclamation of the mayor, then advised property holders not to pay the assessments, and that, in consequence of these ordinances and said proclamation and the decisions of the courts, the drainage assessments became practically valueless and uncollectible. The bill further averred that the city had issued bonds in exchange for drainage warrants given for work done prior to the sale, under the authority of the act of the legislature of 1872, to an amount in excess of all the drainage assessments, which it will claim operated as a discharge of its liability, as assessee of the streets, etc., and of all liability it may have incurred by any dereliction of duty in regard to the assessments against private property, but that this claim was not made known to Van Norden at the time of the purchase, and that he would not have parted with his property for a consideration payable out of drainage assessments, if he had known that such claim would be set up to defeat the payment of the price. The bill closed with a prayer for an accounting of the drainage fund, including the amounts due by the city and the application thereof to the payment of the complainant's warrants and those held by others similarly situated who might come in and avail themselves of the benefits of the bill.

To this bill the defendant demurred for want of jurisdiction and of equity, and because the matters sought to be litigated had been decided adversely to complainant's pretensions by

the Circuit Court in the case of *Peake* v. *New Orleans*, and by the Supreme Court on appeal in the same case, 139 U. S. 342. This demurrer was sustained, the bill dismissed by the Circuit Court, and the case carried to the Circuit Court of Appeals for the Fifth Circuit. That court, being in doubt as to the application of the *Peake case*, certified to this court the questions: First, whether the city, under the warranties, expressed and implied, contained in the contract of sale of June 7, 1876, by which it acquired the property and franchise from Warren Van Norden, was estopped from pleading against the complainant the issuance of bonds to retire $1,672,105.21 of drainage warrants, issued prior to said sale, as a discharge of its obligation to account for drainage funds collected on private property, and as a discharge of its own liability to that fund as assessee of the streets and squares; and, second, whether the decision in *Peake* v. *New Orleans* should be held to apply to the facts of this case and operate to defeat complainant's action.

The first of these questions this court answered in the affirmative; the second it declined to answer. *Warner* v. *New Orleans*, 167 U. S. 467.

Thereupon the Court of Appeals held that the city was estopped from pleading the issue of the bonds, and that the *Peake case* did not necessarily apply to the facts of this case, nor operate to defeat the plaintiff's action. The decree of the Circuit Court sustaining the demurrer was reversed, and the case remanded with instructions to proceed to a decision upon the merits. 52 U. S. App. 348.

The case subsequently went to a hearing upon the pleadings and proofs in the Circuit Court, and resulted in a decree dismissing the bill. Thereupon an appeal was taken to the Circuit Court of Appeals, which reversed the decree of the Circuit Court and remanded the case to that court with directions to enter a decree that the city was indebted to Warner in $6000 with eight per cent interest from June 6, 1876, to be paid out of the drainage assessments set forth in the bill; that such assessments, including those against the city, as the owner of its streets and squares, constituted a trust fund in

the hands of the city for the purpose of paying complainant and other holders of the same class of warrants, and that the case be referred to a master to state an account. Whereupon the city applied for and obtained a writ of certiorari from this court.

Mr. Branch K. Miller for the city of New Orleans. *Mr. Samuel M. Gilmore* was on his brief.

Mr. Wheeler H. Peckham for Warner. *Mr. Richard De Gray* filed a brief for same. *Mr. J. D. Rouse* and *Mr. William Grant* also filed a brief for same.

Mr. Justice Brown, after making the above Statement of the Case, delivered the opinion of the court.

Nineteen assignments of error were filed in this case, but we shall only notice such as were pressed upon our attention in the oral arguments or in the briefs of counsel.

1. That this suit was, at the institution thereof, prescribed by the statutes of Louisiana. In this connection reference is made to Articles 3540, 3544 and 3547 of the Civil Code.

Article 3540 provides that "actions on bills of exchange, notes payable to order or bearer, except bank notes, those on all effects negotiable or transferable by indorsement or delivery, and those on all promissory notes, whether negotiable or otherwise, are prescribed by five years," etc. Even though it could be assumed in this case that this bill was an "action on" these drainage warrants, we think they do not fall within the description of either of the instruments specified in Article 3540. These warrants are in the form of an order, drawn by the Administrator of Accounts upon the Aministrator of Finance, directing him to pay to the order of W. Van Norden, transferee of the Mississippi and Mexican Gulf Ship Canal Company, a certain amount "out of any funds in the city treasury to the credit of said company." They also contain the following memorandum: "This warrant is issued in accordance with the provisions of Act 30 of the session of the General Assembly of the State of Louisiana, held in the year

1871, and the Administrator of Finance, on presentation to him of this warrant, will pay the same in cash, in case there be any funds in the city treasury to the credit of the said Mississippi and Mexican Gulf Ship Canal Company; but should there not be sufficient funds to cash this warrant then the Administrator of Finance is required to indorse upon the same the date of its presentation, and this warrant shall bear interest at the rate of eight per cent per annum from and after the date of such presentation and indorsement until paid."

This instrument is neither a bill of exchange, a promissory note, a note payable to order or bearer, nor an effect negotiable by indorsement or delivery. The construction given to Article 3540 by the Supreme Court of Louisiana confines it to unconditional promises to pay a fixed sum of money on a day certain, whether the obligation be negotiable under the law merchant or not. Conditional obligations which lack these essential characteristics do not come within its provisions. *Baird* v. *Livingston*, 1 Rob. (La.) 182; *Bank of Louisiana* v. *Williams*, 21 La. Ann. 121; *Thompson* v. *Simmons*, 22 La. Ann. 450; *Jouett* v. *Erwin*, 9 La. Ann. 231; *Gasquet* v. *Directors*, 45 La. Ann. 342; *King Iron Bridge Co.* v. *Otoe County*, 124 U. S. 459.

As these warrants were not only payable out of a particular fund to the credit of the Canal Company, but were only payable when there were funds to the credit of such company, we think it entirely clear that they are not included within the terms of Article 3540.

We are also referred to Article 3544, prescribing, "in general, all personal actions, except those before enumerated," by ten years, and to Article 3547, which enacts that "all judgments for money, whether rendered within or without the State, shall be prescribed by the lapse of ten years from the rendition of such judgments. Provided, however, that any party interested in any judgment may have the same revived at any time before it is prescribed," etc., in which case it "shall continue in full force for ten years from the date of the order of court reviving the same." This latter article is

supposed to be applicable to the homologation of the several assessment rolls against the city as well as against private parties, which, under the act of March 1, 1861, were declared to be judgments against the property assessed and the owners thereof, upon which execution might issue in the ordinary mode of proceeding. These homologations or judgments were rendered at the suit of the commissioners of the drainage district, or the city itself, at various times from 1861 to 1875.

But we think a decisive answer to the argument upon both these articles is found in the contract of June 7, 1876, wherein the city purchased of Van Norden the drainage plant, and contracted "not to obstruct or impede, but, on the contrary, to facilitate, by all lawful means, the collection of the drainage assessments as provided by law until said warrants have been fully paid, it being well understood and agreed by said parties thereto that collections of drainage assessments shall not be diverted from the liquidation of said warrants and expenses as hereinabove provided for, under any pretext whatsoever, until full and final payment of the same." In respect to this we adhere to the opinion pronounced by us when this case was first before this court, that the city in respect to this purchase acted voluntarily; that it was not, as had been held in the former case of *Peake* v. *New Orleans*, 139 U. S. 342, with respect to other warrants, a compulsory trustee, but a voluntary contractor; that as the fund was to be partly created by the performance by the city of a statutory duty, it could not deliberately abandon that duty, or take active steps to prevent the further creation of the fund, and then plead a prior issue of bonds as a reason for evading liability upon the warrants. As the city had paid for the property in warrants drawn upon a particular fund, it was under an implied obligation to do whatever was reasonable and fair to make that fund good. Certainly it could not so act as to prevent the fund being made good, and then require the vendor to look to the fund and not to itself. The duty of the city to collect these assessments was affirmed in *State ex rel. Van Norden* v. *The Mayor etc.*, 27 La. Ann. 497. See

also *Cumming* v. *The Mayor*, 11 Paige, 596; *Atchison* v. *Byrnes*, 22 Kansas, 65.

Having thus voluntarily assumed the obligations of a trustee with respect to this fund, it cannot now set up the statute of limitations against an obligation, which, as such trustee, it had undertaken and failed to perform. The rule is well settled that in actions by *cestuis qui trust* against an express trustee, the statute of limitations has no application, and no length of time is a bar. While that relation continues, and until a distinct repudiation of the trust by the trustee, the possession of one is the possession of the other, and there is no adverse relation between them. Perry on Trusts, § 863. In *Oliver* v. *Piatt*, 3 How. 333, 411, it is said that "the mere lapse of time constitutes of itself no bar to the enforcement of a subsisting trust; and time begins to run against a trust only from the time when it is openly disavowed by the trustee, who insists upon an adverse right and interest, which is fully and unequivocally made known to the *cestui que trust*." To set the statute in motion the relation of the parties must be hostile, and so long as their interests are common, or their relations fiduciary, as in the case of landlord and tenant, guardian and ward, vendor and vendee, tenants in common, or trustee and *cestuis qui trust*, the statute does not begin to run. *Zeller's Lessee* v. *Eckert*, 4 How. 289; *Seymour* v. *Freer*, 8 Wall. 202; *Lewis* v. *Hawkins*, 23 Wall. 119. This doctrine has been applied in Louisiana in favor of an administratrix having claims against the estate, in which it is held that, as she cannot sue the estate, the statute will not run against her on her claims against the estate, so long as she is administratrix. *Succession of Farmer*, 32 La. Ann. 1037; *McKnight* v. *Calhoun*, 36 La. Ann. 408. A like ruling was made with respect to taxes levied for a particular purpose, as to which the city was held to be a trustee, in *School Directors* v. *Shreveport*, 47 La. Ann. 1310.

This trust has never been repudiated by the city. In fact, one of the defences set up in the answer was that the city had applied itself with great diligence, and to the full extent of its ability, to improve and make serviceable the drainage work

and to proceed with the collection of drainage taxes, and did all in its power to prosecute the collection of the same, extending the drainage work on its regular tax bills, which were asserted and claimed in every account filed in the courts by administrators, executors, syndics and other persons exercising like authority. By these modes and others, collections were made and accounted for. Indeed, the whole gist of the answer is that the city has executed its trust faithfully, so far as it was possible to do so, by collecting assessments against private persons, but has not accounted for taxes assessed against itself, because it is not legally responsible therefor. There is no claim throughout the answer that the city disavowed the trust.

At the time the assessment rolls were homologated and the judgments against the city were rendered, there was no claim made that the city was not responsible, or that the public grounds, streets and squares were not assessable for these improvements; and in so far as the collection of these judgments is concerned, the city stood in the same relation of trustee to the warrant holders which it did with respect to the assessments upon private property.

The argument that the city repudiated its trust by the abandonment of the work of drainage in 1876, is untenable. Indeed, by the very act of February 24, 1876, under which the city was authorized to purchase the Canal Company's plant, the city was given exclusive control of all the rights, powers and franchises formerly invested in the Canal Company, and authorized to do all the drainage work required to be paid for by assessments upon property, or from the city treasury. What was this purchase made for if not to continue the drainage work? It can scarcely be supposed that the city purchased this plant with a view of discontinuing such work. If it were abandoned at that time it might readily be supposed that such abandonment was temporary, and that the purchase was made in good faith, and for the purpose for which it should have been purchased, namely, the prosecution of the work.

We deem it entirely immaterial whether the assessments

against the city for the drainage of public property were reduced to judgments or not. When put in this form they were none the less obligations of the city — debts which it owed to the drainage fund — was bound to treat as assets collected, and such as were held by it as trustee for the benefit of the warrant holders. Perry on Trusts, § 440; *Stevens* v. *Gaylord*, 11 Mass. 256; *Sigourney* v. *Wetherell*, 6 Met. (Mass.) 553, 557; *Leland* v. *Felton*, 1 Allen, 531, 533. The debts of private owners it agreed to use due diligence to collect, and as to these it was a trustee. Its own debts it was bound to pay, and as to these it was equally a trustee. By reducing its own claim to judgment it neither ceased to be debtor nor trustee.

2. A defence of *res adjudicata*, not noticed by the court below, is set up as arising from the decree of the Circuit Court, affirmed by this court in the case of *Peake* v. *New Orleans*, 139 U. S. 342. This plea is based upon the fact that in that case one James Jackson appeared by intervening petition as the holder of eight purchase warrants, identical in character with those sued upon by the complainant — part of those given in payment of the purchase price of the drainage plant from the Canal Company and Van Norden; that the decree in the *Peake case* was a dismissal of complainant's bill and of all intervening petitions, and that the decree upon the warrants sued upon by Jackson was decisive of the whole series of purchase warrants. It is a sufficient reply to this plea to say that the complainant Warner was neither a party nor a privy to this litigation, and that the decree was binding only upon Peake and such others as actually intervened. *Hook* v. *Payne*, 14 Wall. 252. Indeed, the attempt to identify these warrants with those which were made the basis of Jackson's intervention was evidently an afterthought, as the city in its answer, while setting up the decree in the *Peake case*, makes no mention whatever of the intervening petition of Jackson, and relies upon the final decree of this court, 139 U. S. 342, which turns only upon defences applicable to the Peake claim.

But the case so far from being *res adjudicata* of this is not even a decisive authority. The complainant Peake was a holder of warrants issued to the Mississippi and Mexican Gulf

Ship Canal Company under the act of February 24, 1871, which authorized the Canal Company to undertake the drainage work, required the boards of drainage commissioners to transfer to the Board of Administrators all their assets, and required the latter to collect the drainage assessments and place them to the credit of the Canal Company. This court held that, under this act, the city, though a trustee, was a compulsory trustee and its obligations strictly statutory — such as placed upon the city only a limited responsibility for that which the Board of Administrators might do or omit to do; that it had been denuded by the legislature of all freedom of action; that it had no choice of contractor or price; that neither the property to be taxed nor the means or method of collecting its assessments were intrusted to its discretion, and that by providing an officer for the collection of the assessments it had discharged its duty in that particular. In the intervening petition of Jackson he avers that he is the holder of eight warrants, similar to those described in the bill of Peake, upon which he had obtained judgment; and it is only by looking at the original petition on the law side of the court that it appears that these warrants were issued in favor of Van Norden, transferee of the Ship Canal Company, and that they were indorsed by him. They were evidently treated by this court as standing upon the same footing as the Peake warrants. But however this may be, the whole opinion of this court is based upon the Peake warrants, which, as before said, were not purchase warrants at all, and no allusion is made in that opinion to the Jackson intervention.

In the case under consideration the complainant bases his suit upon $6000 of warrants given for the purchase of the drainage plant. The obligations of the city with respect to these are measured, not by the act of 1871, but by the act of February 24, 1876, authorizing such purchase, and by the contract of sale, wherein the city agrees to facilitate by all lawful means the collection of the drainage assessments, and to apply the same to the liquidation of these warrants. In respect to these warrants we held, when this case was first before this court, 167 U. S. 467, 477, that the city acted vol-

untarily; that it was not, in reference to these warrants, as it was to those in the *Peake case*, a compulsory trustee, but a voluntary contractor; and that it could not, when purchasing property and contracting to pay for it out of a particular fund, and issuing warrants therefor payable out of such fund, deliberately abandon that duty, take steps to prevent the further creation of the fund, and plead in defence to a liability on the warrants that it had, prior to the purchase, paid off obligations theretofore created against the fund.

For these reasons we hold that there is not only no room for a plea of *res adjudicata*, but that the *Peake case* is not to be considered as a controlling authority.

3. The gravamen of the bill is that, after the purchase of the drainage plant, the city became possessed of the sole power of completing the system of drainage, that it became its duty to do so or to establish some other system; but that from the very date of the purchase the city ceased all work, sold some of the boats and machinery purchased, diverted the proceeds of taxes to other purposes than that of the payment of drainage warrants, allowed other boats to rot and sink, and also permitted the canal dug by the company to fill up with sediment. Further, that the city did nothing to enforce payment and collection of the drainage taxes, but adopted an ordinance advising drainage taxpayers not to pay, whereby, by reason of her conduct in abandoning her system of drainage, the Supreme Court of Louisiana in *Davidson* v. *New Orleans*, 34 La. Ann. 170, decided that such taxes could not be enforced and collected. That by this and other means it destroyed the drainage fund, until now the same has become unenforceable and worthless to the holders of the warrants.

In this connection the city averred in its answer that it had performed its full duty in relation to the collection of assessments against private property, but admits that the proclamation referred to in the bill advising property owners not to pay drainage assessments was issued by the mayor under authority of an ordinance of the city. It further alleged that the drainage plans made by the Canal Company were so defective that their completion would have been of no benefit to the property

attempted to be drained; that the work done under them was also defective and of no value, and that for these reasons the city was justified in suspending the further prosecution of the work, which resulted in the decision of the Supreme Court in the case of *Davidson* v. *The City of New Orleans*, 34 La. Ann. 170, declaring judgments for drainage assessments void for failure of consideration, and that this decision had become the settled rule of law in the State, rendering further collections impossible; but that, notwithstanding this decision, the city had constantly and at all times endeavored in every way possible to realize the assessments; and the city filed an account showing the collections made in 1871 to June 20, 1891, inclusive, and the disposition thereof, as a sufficient compliance with its duty as trustee. The answer further set up and pleaded that the city had discharged itself from all liability for drainage taxes which it had collected, or ought to have collected, for the benefit of the warrant holders, by the issue and delivery of bonds to the amount of $1,672,105.21 to take up drainage warrants issued under the act of 1871, all of which were used and applied at various times between May 10, 1872, and December 31, 1874, to the redemption of drainage warrants.

That the city is estopped to plead the issue of bonds as a discharge of its obligation to the holders of these purchase warrants, was settled upon the prior hearing of this case. *Warner* v. *New Orleans*, 167 U. S. 467, 477. In this connection we said: "That one who purchases property, contracting to pay for it out of a particular fund, and issues warrants therefor payable out of that fund — a fund yet partially to be created, and created by the performance by him of a statutory duty — cannot deliberately abandon that duty, take active steps to prevent the further creation of the fund, and then, there being nothing in the fund, plead in defence to a liability on the warrants drawn on that fund, that it had prior to the purchase paid off obligations theretofore created against the fund."

Prior to the purchase of the Ship Canal Company's plant from Van Norden, the legality of these drainage assessments had been affirmed by the Supreme Court of Louisiana. *In the matter of the Commissioners of the First Draining District*,

27 La. Ann. 20. This was a proceeding by the City Board of Commissioners praying for the homologation of certain assessment rolls for drainage taxes, to which opposition was made upon different grounds. The court, however, sustained the assessments, and, in the opinion, remarked that "the State in ordering the draining, is exercising sovereign power, and can, of course, direct or authorize the work to be done in such way and compensation made on such terms as in its discretion may seem best, restrained only by the fundamental principles upon which the government is to be conducted, and we find nothing in them inhibiting the State from having the means provided for such a work, in the way it is done in the present system of drainage in the city of New Orleans. On this question we see no room for judicial interference with the discretion of the State, and we think the existing laws authorize the collection sought herein to be enforced." So far then, as the law is concerned, there would seem to have been no doubt of the validity of these assessments, had the city continued the work and lived up to the obligations of its contract with Van Norden.

With reference to its alleged neglect in this particular the Court of Appeals found that all the facts averred in the bill had either been admitted by the answer, or abundantly established by evidence. When the city purchased the drainage plant it seems to have been in good condition, and although the work had been about two thirds completed, the city not only abandoned the work but proceeded to disqualify itself from undertaking it. In April, 1878, an ordinance was adopted instructing the Administrator to advertise the dredge boats for sale. Although this does not seem to have been carried out, another ordinance was adopted in July requiring three boats, which were then in bad condition, to be broken up and the material stored. Subsequently, and in April, 1881, the mayor was authorized to issue and did issue a proclamation advising the people not to pay their drainage taxes until the question was decided by the Supreme Court, although the validity of these taxes had been determined in the case above cited. This expected decision was delivered in March, 1882,

in the case of *Davidson* v. *City of New Orleans*, 34 La. Ann. 170, in which the court found that, owing to the fact that plaintiff derived no benefit from the contemplated drainage, *the abandonment of all drainage work*, the disposal of all drainage apparatus, the impotency of the city to resume the enterprise, and the fact that the property assessed was worth but one tenth of the amount claimed, the taxes could not be collected. The prior case was cited, and the decision put upon the ground that "causes, occurring subsequently to the rendition of judgments, may render their execution illegal and inequitable, and violative of rights not within the contemplation of the court when the judgment was rendered, and not intended to be foreclosed thereby. . . . Here would be a failure of the only possible consideration of such judgments, and it could not be doubted that such failure would furnish just ground to enjoin their execution." But the court did not hold that the city itself could set up this defence — its own dereliction of duty.

We do not appreciate the equity of now permitting the city to set up this decision as an excuse for its failure to collect these assessments, since the decision itself is based upon the fact that the city had been derelict in abandoning the work, and failing to carry out in good faith its contract with Van Norden. The Court of Appeals further found that, so far as the answer attempted to fasten the responsibility for the alleged defects in the drainage plant upon Van Norden, its transferee, as a defence to this action, it was entirely unsupported by the evidence, as counsel for the city very frankly admitted in their argument at the hearing. Under the act of February 24, 1871, authorizing the Ship Canal Company to undertake the work, power was reserved to the City Board of Administrators to designate the location of the canals and levees to be built by the company, subject to certain specifications provided by the act, to build and run all the pumps and drainage machinery necessary to lift the water from the canals into Lake Pontchartrain, and to keep the water in the canals at the proper level for the work of excavation, and at the same time assist the drainage of the adjacent lands. It

was further made the duty of the City Surveyor to examine the work each month, certify to the Administrators of Accounts the number of cubic yards excavated and the number of yards of levees built, for which warrants were to be drawn upon the Administrators of Finance, and to be paid from the funds to the credit of the Canal Company. In fact, the city by ordinance located these canals, put the matter in charge of the Administrator of Improvements, and, through its officers, exercised supervision over the work. The testimony is that it was done strictly in accordance with the specifications furnished. If, as testified, it was not sufficiently extensive to meet the requirements of the city, or the plant was in any respect defective, such faults were due to the city itself, rather than to the contractors. In this connection the conclusion of the Court of Appeals was that the plan under which the work was done by the Canal Company and its transferee would, if carried out as contemplated, have sufficiently accomplished the drainage of the lands within the several districts to render the assessments available, if the city had kept the work in a serviceable condition, as the law required. Indeed, the fact that the city had abandoned the work, and, so far from facilitating by all lawful means the collection of the drainage assessments as provided by law, not only did nothing in this direction, but advised the taxpayers not to pay such assessments, is really too clear for argument.

4. If the city be not estopped, by consenting to the homologation of the assessment rolls — in other words, consenting to the judgments against itself — to question its liability for the assessments upon its streets, squares and other public places, or by drawing these warrants against the drainage fund, we think the validity of those assessments sufficiently appears from the opinions of the Supreme Court of Louisiana sustaining similar assessments upon public property. The argument is that public property, being exempt from taxation, is also exempt from these assessments; but the authorities have long recognized a distinction between general taxes, which are for the benefit of the public generally, and which in the nature of things the public must directly or indirectly pay, and spe-

cial assessments for the benefit of particular property, which are a charge upon the property benefited. If this be private property, then each owner of such property pays his share; if it be public property, the city pays it as the agent of the entire body of its citizens, who are assumed to have been benefited to that extent. *Charnock* v. *Levee Co.*, 38 La. Ann. 323.

This was apparently the view taken by the Supreme Court of Louisiana in the case of *The New Orleans Draining Co.*, 11 La. Ann. 338, 377, in which it is said of similar assessments that "the large portion of the expenses which, by this view, is thrown upon the city for the streets, meets in some measure that equity which has been urged upon our consideration, that as this work has been undertaken for the public good, the public ought to bear the charge of it, notwithstanding the benefit of it to the owners of the soil."

In *Marquez* v. *City of New Orleans*, 13 La. Ann. 319, property owners upon a certain street refused to pay more than one half of their assessments for paving, upon the ground that the city owned a promenade located in the centre of the street opposite the paved road. It was held that the city should pay one half of the entire cost of paving, upon the ground of its ownership of this public ground. This case was subsequently approved in the similar case of *Correjolles* v. *Succession of Foucher*, 26 La. Ann. 362, and in *Barber Asphalt Paving Co.* v. *Gogreve*, 41 La. Ann. 251, 259.

In the *County of McLean* v. *Bloomington*, 106 Illinois, 209, it was also claimed that public property, being expressly exempt from taxes, was also exempt from special assessments. But, said the court, "we have been too long and too firmly committed to the doctrine that exemption from taxation does not except from special assessments to now admit that it is even debatable. . . . The distinction between taxation and special assessment is also clearly made in our present constitution, and while providing that the General Assembly may exempt the property of the State, counties and municipal corporations from the former, section 3 makes no provision in regard to the latter, but, on the contrary, . . . authorizes the General Assembly to vest the corporate authority of cities,

towns and villages with power to make local improvements by special assessments without any restriction as to the property to be assessed." This ruling was followed in *Adams County* v. *Quincy*, 130 Illinois, 566; Beach on Pub. Corps. § 1172. The rule is different in Massachusetts, *Worcester County* v. *Worcester*, 116 Mass. 193, and perhaps also in Connecticut, *State* v. *Hartford*, 50 Conn. 89; but as this is a question of local law, we are bound by the Louisiana cases.

There is nothing in the several statutes of Louisiana upon the subject which indicate that private property only was intended to be affected. It is true that by the act of 1858, § 7, the District Court is empowered to decree that each portion of the property situated within the draining limits is subject to a first mortgage, lien and privilege in favor of the Board of Commissioners for such amount as should be assessed upon such property for its proportion of the cost of the draining; and that this was obviously intended not to apply to public property. But while it is doubtless true that public property was not intended to be chargeable with a lien under which it might be sold and title pass to private parties, it by no means follows that the city is not liable, and that in such cases the amount should not be paid out of the treasury. *Adams County* v. *Quincy*, 130 Illinois, 566. Indeed, something of this kind seems to have been contemplated in the act of February 24, 1876, § 4, where the city was given the power of doing all the drainage work "required to be paid for by assessments upon property, or *from the city treasury*." This would seem to contemplate that the drainage work applicable to public property was to be paid for by the public out of the municipal treasury. Indeed, it is improbable that, if the cost of draining the streets and public squares was to be included in the proportion which each parcel of private property was to contribute as its share of the expense, no mention was made of this or of the manner in which the liability of each private owner for his proportion of the expense of draining the public property was to be ascertained. That the city was itself liable was evidently the view taken by the city officers when the assessment rolls were homologated.

One thing in this connection is certain. No general system of drainage could be established that did not include streets and public squares as a part of the territory to be drained. Assuming that no provision was made as to how the proportion applicable to public property was to be assessed and paid for, but that elaborate provision was made for the assessment of private property for its proportion of such expense, and for the creation of a lien therefor, enforceable by the courts, what follows? That private property was to be assessed for its contributory portion of a public expense? Not at all. Private owners may be assumed to be interested in draining their own property, but in the absence of a special provision to that effect there is no presumption that they are also to be called upon to pay that which *prima facie* belongs to the public. Indeed, in view of a recent decision in Massachusetts, it may well be doubted whether the legislature could impose the cost of draining public property upon private lot owners. *Sears* v. *Street Comrs.*, 53 N. E. Rep. 876. The expense of keeping streets in order is a public charge, and the same may be said of all other expenses which are for the benefit of the public. It is true that the expense of paving may be assessed upon the adjoining property upon the theory that such property is specially benefited by the improvement, but a special provision is necessary to create such charge.

As the Boards of Drainage Commissioners assessed the city for the expense of draining its public property, and the legislature approved all these assessments in the act of February 24, 1871, and the city subsequently assented to the homologation of these assessment rolls, except in the first district, and to judgments against itself for the amount of the assessments, it is difficult to see upon what principle it can now after a lapse of more than twenty years raise the question of its liability. We know of no reason why these judgments should not be treated as conclusive. A judgment for taxes does not differ from any other in respect to its conclusiveness. *United States* v. *New Orleans*, 98 U. S. 381; *Driggers* v. *Cassady*, 71 Alabama, 529, 533; *Cadmus* v. *Jackson*, 52 Penn. St. 295; Freeman on Judgments, § 135; *Mayo* v. *Foley*, 40 California, 281;

Anderson v. *Rider*, 46 California, 134; *Starns* v. *Hadnot*, 42 La. Ann. 366.

5. The only other assignment of error we are required to notice is that the court erred in holding that the constitutional amendment of 1874 (Laws of 1874, page 56, Joint Resolution No. 22), limiting the power of the city of New Orleans to contract debts, was not a complete defence to this suit. This amendment is as follows:

"The city of New Orleans shall not hereafter increase her (its) debt in any manner or form or under any pretext. After the first of January, 1875, no evidence of indebtedness or warrant for the payment of money shall be issued by any officer of said city except against cash actually in the treasury; but this shall not be so construed as to prevent . . . the issue of drainage warrants to the transferee of contract under act No. 30 of 1871, payable only from drainage taxes, and not otherwise."

The argument is that the act of February 24, 1876, authorizing the purchase by the State of the drainage plant and franchise, is null and void, because it had the effect of increasing the debt of the city in violation of the supposed prohibition contained in said constitutional amendment of 1874.

At the time this amendment was adopted, the act of February 24, 1871, which provides for the drainage of New Orleans, was in force. This act authorized the Ship Canal Company to undertake the drainage of the city under the general direction of the Board of Administrators, and to provide funds for the payment of the work, directed the Boards of Drainage Commissioners to turn over to the Board of Administrators "all moneys, assessments and claims of drainage in their hands," including all judgments in favor of the commissioners, authorized the Board of Administrators to collect from the holders of property within the draining districts the balance due on the assessments, as shown by the books, "which said assessments are hereby confirmed and made exigible, at such time and in such manner as the Board of Administrators may designate; provided, that the said board shall collect the said assessments herein authorized in time to

provide for the payment of the warrants to be issued to the said company at the date of their issue," and place all collections to the credit of the Canal Company for the drainage of the city. The Ship Canal Company, having become embarrassed by the want of funds in the city treasury to pay the drainage warrants, on May 22, 1872, made a contract with Van Norden, by which he agreed to advance to the Canal Company $150,000 to meet the expenses of doing the work, upon condition of being reimbursed out of the warrants and money which might be obtained from the city of New Orleans, and to secure the same the company assigned to him all moneys, profits and benefits that were to be realized by the execution of the work, as well as all certificates and warrants to be received, with authority to collect them. Subsequently, and on November 22, 1872, the company assigned all its property to Van Norden, acknowledging an indebtedness of $161,962.86 for moneys advanced. At the time the constitutional amendment went into effect the work was being carried on by Van Norden under the above contracts with the Ship Canal Company.

The assessments, both against the city and individuals, which constitute the debt from which the warrants are to be paid, were all in existence long prior to this amendment, and were reduced to judgments at sundry times from 1861 to 1873. It seems, however, that the city concluded to do this work itself, and applied to the legislature for authority to purchase of Van Norden his drainage plant and to undertake itself to do the drainage work. This authority was granted by the act of February 24, 1876, under which the contract was made with Van Norden to purchase the plant, and to pay therefor the sum of $300,000 in drainage warrants as a consideration for the property, and also in full settlement of all claims for damages which the Canal Company or Van Norden had against the city. To provide for the payment of these warrants the city agreed that the rights of the holders of such warrants should remain unimpaired, and that the drainage taxes should be administered and paid under certain conditions, and their collection assigned to an officer to be selected

by Van Norden, — the city agreeing, as heretofore stated, to put no obstacle in the way of such collections.

We think it was the intention of the constitutional amendment to validate the issue of the drainage warrants to the transferee of the contract, not only for the work done but for the property purchased by the city, in case it should elect to do the work itself. The act of 1876 did not so much authorize an increase of the city's debt as a diversion of the warrants to the purchase of the drainage plant instead of a payment to the transferee for work done. We think the amendment should receive a construction commensurate with the object intended to be accomplished, namely, the drainage of the city, whether such drainage were carried out by Van Norden or by the city itself, and that it should not be limited to such warrants as were to be issued for the work. The debt for the assessments had already been incurred and put in judgment, and the amendment was intended to recognize the existence of such debt, and to provide that the warrants issued in payment of the same should not be treated as within the scope of the amendment. Beyond this, however, these warrants were to be issued not only in payment of the drainage plant but in settlement of Van Norden's claims against the city for damages connected with the failure of the city to carry out its contract with the Canal Company and Van Norden, which, in view of the fact that the drainage plant had been purchased by him for $50,000, may be assumed to have been the greater part of the consideration.

Indeed, it is open to serious consideration whether the reservation of drainage warrants in the constitutional amendment of 1874 was necessary, in view of the fact that the assessments had already been reduced to judgments against the city and the property owners, and that the further issue of drainage warrants was rather in the nature of the payment of a debt already incurred than the creation of a new obligation. There can be no question that the amendment was not designed to impair the validity of a debt already legally incurred, and that if it had attempted that, it would have been hostile to the provision of the Federal Constitution against impairing the obligation of a contract.

6. It is scarcely necessary to say that the fact that the city chose to pay $300,000 in 1876 for property which Van Norden bought in 1872 from the Ship Canal Company for $50,000, is not one which can be considered here. The act of 1876, authorizing the purchase and the settlement of claims against the city, provided for the appointment of an appraiser to estimate the value of the rights and things to be purchased or settled for. This appraiser was appointed and appraised the dredge boats and machinery at $153,750, being twenty-five per cent less than the original cost. He announced himself as unable to come to a conclusion with reference to the damages claimed. It must be borne in mind that the consideration of $300,000 was fixed upon not only to cover the value of the property of the plant, but the exclusive franchise under the act of 1871, and the claims for damages against the city.

It may be that the city made a bad bargain. It may be that it paid far more than the fair value of the property and claims purchased. It may be that the action of the common council was dictated by improper considerations, though this is rather hinted at than asserted; but from the case of *Fletcher* v. *Peck*, 6 Cranch, 87, 130, to the present time we have uniformly refused to inquire into the motives of legislative bodies. In this case Mr. Chief Justice Marshall, speaking for the court, observed: "That corruption should find its way into the governments of our infant republics, and contaminate the very source of legislation, or that impure motives should contribute to the passage of a law, or the formation of a legislative contract, are circumstances most deeply to be deplored. How far a court of justice would, in any case, be competent, on proceedings instituted by the State itself, to vacate a contract thus formed, and to annul the rights acquired under that contract by third persons having no notice of the improper means by which it was obtained, is a question which the court would approach with much circumspection. It may well be doubted how far the validity of a law depends upon the motives of its framers, and how far the particular inducements operating on members of the supreme sovereign power of a State, to the formation of a contract by that power, are exam-

inable in a court of justice. . . . If the majority of the legislature be corrupted, it may well be doubted whether it be within the province of the judiciary to control their conduct; and if less than a majority act from impure motives, the principle by which judicial interference would be regulated, is not clearly discerned." See also *Ex parte McCardle*, 7 Wall. 506, 514; *Doyle* v. *Continental Ins. Co.*, 94 U. S. 535; *Soon Hing* v. *Crowley*, 113 U. S. 703; *United States* v. *Old Settlers*, 148 U. S. 427, 466; *United States* v. *Des Moines Navigation Co.*, 142 U. S. 510, 543. This is also the law in Louisiana. *Villavaso* v. *Barthet*, 39 La. Ann. 247, 258.

7. The objection that the decree finds the city a debtor to the complainant in the amount of the warrants is more apparent than real, since it also declares that he is entitled to be paid out of the drainage assessments, refers it to a master to state an account of such assessments, and provides for an absolute decree against the city only if the fund established by the accounting shall be sufficient, and for a *pro rata* decree if such fund be not sufficient to pay all the warrant holders in full.

There was no error in allowing interest except as to amount. The act of 1876, authorizing the city to purchase the drainage plant, declared that the consideration should be paid in drainage warrants, issued in the same form and manner as those theretofore issued under the act of 1871 for work done. This act of 1871 provided that if there should not be sufficient funds to cash the warrants when issued, the Administrator of Finance was required to indorse upon them the date of presentation, after which such warrants should bear interest at the rate of eight per cent until paid. The warrants also made this provision upon their face. But there was no presentation for payment as the statute and warrants required, and there was no waiver of such presentation. In 1876, it is true, the city abandoned the work, but the whole of complainant's case rests upon the theory that there was no repudiation of the trust, or of the obligation to do whatever was possible in the collection of the assessments. If, then, the trust continued so as to charge the city as trustee, the obligation of the complainant to take

such measures as were necessary to charge the city with interest also continued. But the liability of the city to pay interest was conditioned upon the presentation of the warrants and the indorsement upon them of the date of such presentation. While refusal to indorse the date, upon a proper presentation of the warrants, would not prevent the collection of interest, there must have been a presentation, or something equivalent thereto, before interest would begin to run. If the city had wholly denied the right of complainant, or distinctly refused to perform its obligation, or had wholly disabled itself from complying with its contract, a different question might have arisen, but the mere abandonment of the work was not sufficient to obviate the necessity of a demand. *Bérard* v. *Boagni*, 30 La. Ann. 1125.

But the commencement of suit was a sufficient demand to charge the defendant the interest from that day, *Fuller* v. *Hubbard*, 6 Cowen, 13, 22, at the rate specified in the contract. It is true, the cases of *Brewster* v. *Wakefield*, 22 How. 118; *Burnhisel* v. *Firman*, 22 Wall. 170, and *Holden* v. *Trust Co.*, 100 U. S. 72, hold that, where there is a promise to pay upon a certain day with interest at an exorbitant rate, the creditor is only entitled to interest after that time by operation of law and not by any provision in the contract; although if the local law be different, this court will follow it. *Cromwell* v. *Sac County*, 96 U. S. 51, 61; *Ohio* v. *Frank*, 103 U. S. 697. These very cases, however, recognize the principle that, if the parties themselves have fixed a rate to be paid up to the time of payment, that rate will be respected. In this case both the statute and the warrants provided that such warrants shall bear interest at the rate of eight per cent "until paid," and we are therefore of opinion that complainant is entitled to that rate from November 26, 1894, the date of filing the bill and issuing the subpœna.

While this opinion does not cover all the assignments of error, it disposes of all questions raised by counsel in their briefs, and

Our conclusion is that the decree of the Court of Appeals be modified in respect of the date from which interest is to

be calculated, and as so modified affirmed, with costs of this court equally divided, and that the case be remanded to the Circuit Court for the Eastern District of Louisiana with a direction to comply with the decree of the Court of Appeals as modified, and it is so ordered.

MR. JUSTICE WHITE and MR. JUSTICE PECKHAM did not sit in this case and took no part in its decision.